IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

No. ~~799~~ 4

THE UNITED STATES OF AMERICA

vs.

WILLIAM R. JOHNSON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR WILLIAM R. JOHNSON.

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STATEMENT OF THE CASE.

This case is before this Court pursuant to writ of certiorari granted on the petition of the Government to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, which reversed a judgment of the District Court for the Northern District of Illinois entered on a verdict of a jury finding this defendant, William R. Johnson, guilty of wilfully attempting to evade the payment of income taxes for the years 1936, 1937, 1938 and 1939, and of conspiracy to defraud the United States of income taxes. Opinion below, 123 Fed. (2nd) 111.

The statement for the Government is incomplete and consists principally of mere conclusions without foundation in competent evidence. We feel that it is our duty to state the case so that this Honorable Court will more readily understand the errors of the District Court on which we relied for reversal of its judgment and now rely for affirmance of the judgment of the Circuit Court of Appeals.

The errors assigned in the Circuit Court of Appeals arose out of the overruling by the District Court of this defendant's motion to quash the indictment, the overruling of the demurrer to the indictment, the denial of his motion for a more specific bill of particulars, the overruling of objections to the admission of evidence, the improper cross-examination of this defendant and his co-defendants, the denial of this defendant's motion to direct a verdict of not guilty, the denial of his motion for a mistrial, the refusal of his requested instructions, the sending with the jury on retirement of exhibits containing prejudicial matter, the denial of the motion for a new trial, and the denial of the motion in arrest of judgment.

The Pleadings, Motions and Orders.

This prosecution was commenced by the return of an indictment at the March 1940 Term by a grand jury for the December 1939 Term of the District Court which was continued to the February Term and then to the March Term.

Defendant Johnson filed his verified motion to quash the indictment on the following grounds:

(a) The order entered at the February 1940 Term, purporting to authorize the continuance of the December 1939 grand jury to the March 1940 Term, is void in that it authorized said grand jury to continue its service through said March Term to finish investigations begun by it at said February Term, whereas the Court had authority

under the statute to continue said grand jury solely to finish investigations begun by it at the said December Term and not finished by it at said December Term or at the succeeding February Term.

(b) The fourth and fifth counts allege facts which show that the matters alleged with respect to the year 1939 were not presented to said grand jury at said December Term but were first presented at said March Term when said grand jury had no authority to hear such matters.

(c) The first, second and third counts are exact duplicates respectively of the three counts of the indictment in No. 32127 returned by the same grand jury against this defendant at said February Term on March 1, 1940, which shows that the investigation of the matters contained in said first three counts was finished and concluded at said February Term, by reason of which the Court had no authority under the statute to continue said grand jury to investigate said matters at the succeeding March Term. I. R. 28-31.

Defendant filed a motion to require the Government to answer the allegations of fact set forth in his motion to quash. (I. R. 44.) The District Court denied the motion for rule on the Government to answer and it overruled the motion to quash. (I. R. 45.) The Circuit Court of Appeals held that the District Court erred in denying the defendant an opportunity to prove the facts alleged and in overruling the motion to quash. I. R. 182-188.

Defendant Johnson also filed a demurrer to the indictment urging the following grounds of insufficiency:

(a) The indictment and each count thereof fail to allege facts which state an offense under the statutes of the United States.

(b) The indictment and each count thereof omit averments of fact necessary to show the authority of the De-

cember 1939 grand jury to return this indictment at the March 1940 Term.

(c) The first four counts of the indictment are duplicitous and repugnant in that they charge that this defendant did on a certain day attempt to evade and also that the attempt to evade was a continuing offense beginning prior to the day certain and continuing to the date of the indictment. Each of said counts also charges four separate offenses,—(1) the attempt to evade income taxes, (2) the filing of a false income tax return, (3) the failure to supply records and other information relative to income, and (4) the failure to make a return as to certain income. I. R. 37-38.

The demurrer was overruled by the District Court (I. R. 45) and as to this defendant the Circuit Court of Appeals held that the demurrer should have been sustained as to the fourth count (I. R. 189), and that the demurrer was properly overruled as to the first, second, third and fifth counts. I. R. 190.

Upon the motion of defendant Johnson for a bill of particulars (I. R. 47), an order was entered requiring certain particulars to be furnished (I. R. 62) and a bill of particulars was filed which stated only that the income alleged consisted of the income from a group of named gambling houses, including currency exchanged and proceeds of checks cashed by other persons named. (I. R. 64-72.) Thereupon defendant filed his motion for a more specific bill of particulars, (I. R. 134-139,) which was refused. (I. R. 140.) Thereafter the Government voluntarily filed a short supplement to the bill of particulars (I. R. 141-142) which did not supply the information desired by this defendant.

At the close of the evidence for the prosecution defendant Johnson filed his motion for a directed verdict of not

guilty (I. R. 146) and his motion to require the prosecution to elect whether it would proceed on the first four counts or upon the fifth count (I. R. 145-146), both of which motions were overruled. (I. R. 147.) Again at the close of all the evidence these motions were renewed (I. R. 148) and there was also a motion to withdraw a juror and declare a mistrial (I. R. 151-152), all of which were overruled.

Theory of the Case.

The prosecution sought to sustain the allegations that defendant Johnson failed to report all of his taxable income for the years 1936 through 1939 by two distinct methods:

(a) By undertaking to prove that he owned a group of gambling houses operated in and about Chicago and that all the proceeds of checks cashed and currency exchanged by persons operating these gambling houses were income from these gambling houses, and therefore that the aggregate of these financial transactions was taxable income of this defendant which was in excess of the amount of net income which he reported; and

(b) By offering proof that he expended in said years more cash than he had available for spending according to the income reported and admitted assets.

It is the position of this defendant that he did not own any of said gambling houses and that he had no interest in any of the financial transactions, and also that he had available from reported income and accumulated capital cash exceeding his expenditures, and that there is a total failure of proof that he had a taxable income, which he did not report, in any of the four years.

The Facts.

This is not the usual income tax evasion case. William R. Johnson filed returns regularly from 1921 to the present

time and his returns have been regularly audited. (III. R. 960.) At no time during all this period was he charged with fraud until the investigations which resulted in his indictment in 1940. There have been the usual tax adjustments from year to year and if it was found that Johnson owed more tax than he had paid he paid the additional amount. Only once was he assessed the five per cent. penalty for negligence in the preparation of his return and that was nearly ten years ago. II. R. 8.

This defendant was born in Chicago and has lived there continuously during the forty-five years of his life, and bears a good reputation among the citizens of the community for truth, integrity and fair dealing. The parish priest, the family physician, two neighbors and four business men testified to a long acquaintance with Johnson and vouched for his good reputation among the people of Chicago and vicinity. III. R. 916-920.

There were received in evidence Johnson's returns for the years 1932 to 1939 inclusive. (II. R. 8-9.) His return for the calendar year 1932 (Gov. Ex. R-6) showed a net income of $74,553.85, for 1933 (Gov. Ex. R-7) of $80,079.85, for 1934 (Gov. Ex. R-8) of $142,125.43, for 1935 (Gov. Ex. R-9) of $68,211.14, for 1936 (Gov. Ex. R-10) of $173,220.40, for 1937 (Gov. Ex. R-11) of $264,015.13, for 1938 (Gov. Ex. R-12) of $120,975.15, and for 1939 (Gov. Ex. R-13) of $268,885.98. His accountants usually reported his income from gambling as "Miscellaneous Speculative Income". II. R. 103, 437.

Government Agent Clifford computed this defendant's income for 1936 to be $547,942.38. (III. R. 742.) In making this computation Clifford included all the proceeds from checks cashed and the estimated total of currency exchanged by co-defendant Sommers at the Northern Trust Company, all of the proceeds of checks cashed and the estimated total of currency exchanged by co-defendants

Sommers, Kelly and Hartigan at the Albany Park Currency Exchange, and all of the proceeds of checks cashed by co-defendant Creighton at the Mid-City National Bank, and by co-defendant Flanagan at the Lawndale Currency Exchange. III. R. 750-751.

Clifford computed this defendant's income for 1937 to be $1,047,129.77. (III. R. 743.) In making this computation Clifford included the estimated total of currency exchanged by co-defendant Sommers at the Northern Trust Company, the proceeds from checks cashed by co-defendants Sommers, Kelly and Hartigan at the Albany Park Currency Exchange, the total of the currency deposited by the Albany Park Currency Exchange at the Milwaukee Avenue National Bank, the proceeds of checks cashed by defendant Creighton at the Mid-City National Bank, and the total of the $100 bills supplied to the Lawndale Currency Exchange by the Roosevelt Agency and Loan Company. III. R. 751-752.

Clifford computed this defendant's income for 1938 to be $935,353.80. (III. R. 744.) In making this computation Clifford included the estimated total of the currency exchanged by co-defendant Sommers at the Northern Trust Company, the proceeds from checks cashed and the estimated total of currency exchanged by co-defendants Sommers, Kelly and Hartigan at the Albany Park Currency Exchange, the proceeds of checks cashed by co-defendant Creighton at the Mid-City National Bank, the total of $100 bills supplied to the Lawndale Currency Exchange by the Roosevelt Agency and Loan Company, and 74.87% of the proceeds of the checks deposited for collection by the Lawrence Avenue Currency Exchange at the North Shore National Bank and at the Central National Bank. III. R. 752-753.

Clifford computed this defendant's income for 1939 to be $961,504.77. (III. R. 745.) In making this computa-

tion Clifford included the estimated total of currency exchanged by co-defendant Sommers at the Northern Trust Company, the estimated proceeds from checks cashed by co-defendant Creighton at the Washington Park Currency Exchange, and $886,499.30 which he calculated represented the balance of the estimated $1,100,000 of gamblers' checks that went through the Lawrence Avenue Currency Exchange. III. R. 754.

These computations for each of the years were made on the assumption that defendant Johnson was the *sole* owner of all the gambling houses named in the indictment and that *all* checks cashed and currency exchanged by Sommers, Flanagan, Creighton, Kelly, Hartigan, Wait and Mackay represented *taxable income* of this defendant. III. R. 751.

Evidence Under First Theory.

All the direct evidence was to the effect that this defendant did not own, had no interest in, and received no income from any of the gambling houses named in the indictment or in the evidence, except such interest as he had in the Bon-Air Country Club gambling room through his ownership of stock in the Bon-Air Catering Company. Sommers was the sole owner and operator of the Horse-Shoe Club and of the Dev-Lin Club. (III. R. 782-787, 791-803, 810-812.) Creighton was the sole owner and operator of the Southland Club, the Club Western, the Select Club, the Vincennes Club, the Lake Park Club, the Harlem Club, the Club Proviso and the 406 Club. (III. R. 850-858.) Flanagan was the sole owner and operator of the 4020 Club, the 2141 Club and the service bureau, first located at 2135 South Crawford (now Pulaski) and later at 4707 Irving Park, which also had a rear entrance at 3755 Milwaukee. (III. R. 891, 931.) Hartigan was the sole owner and operator of Harlem Stables, (II. R. 462, III. R. 791, 792, 804-806), and of the gambling room

at Lincoln Tavern. (III. R. 896.) Mackay was the owner and operator of the Casino Club. (II. R. 330, 339, 375, 382.) Wait operated the gambling room at the Villa Moderne, (III. R. 896,) and was *the president of the Bon-Air* Catering Company, which operated the gambling room at the Bon-Air Country Club. (III. R. 910.) Johnson testified that he had no interest in and received no income from any of these gambling houses, (III. R. 949-950,) and that the gambling room at the Bon-Air operated only in 1939 and that the profits of about $22,000 were credited to advancements in other departments made during the year. III. R. 956, 983.

The circumstantial evidence offered to show that defendant Johnson was the sole owner of the gambling houses listed, and that the operators were mere employees of Johnson, consisted of testimony that Johnson frequently visited some of these places, that he talked with the persons who were in charge, that he exercised influence in the employment of some of the employees, that one group of workmen did carpenter and other construction work at several of the gambling houses, that bus service was provided by the same company to some of the places, that one drayman moved a few tables and chairs from one house to another, that the same accountants served Johnson and some of the other defendants in preparation of their income tax returns during part of the period, and that large quantities of $100 bills were taken by the operators of these gambling houses in cashing checks and exchanging currency and that Johnson used $100 bills in paying in part the purchase price of and for construction work on properties owned by him and in which he was interested, and other similar and related circumstances. Briefly, this testimony was as follows:

Sixteen Government witnesses,—Schumacker (II. R. 177-178), Cieslik (II. R. 222), Didier (II. R. 225), Greenberg

(II. R. 233), Cusack (II. R. 249), Weeks (II. R. 276), Kehoe (II. R. 309), Coote (II. R. 315), Lang (II. R. 319), Lebbin (II. R. 322), Meyer (II. R. 328), Leonard (II. R. 339), Ehrlich (II. R. 347), Cobb (II. R. 351-352), Wolfson (II. R. 387), and Singer (II. R. 396-397),—testified that they solicited Johnson to assist them in getting employment in gambling houses and some of them stated that Johnson helped them get jobs. All but four of these men admitted that Johnson merely recommended them for employment and that they were employed by and worked for the respective operators of these gambling houses. Only Schumacker, Didier, Kehoe and Cobb stated the conclusion that Johnson actually directed someone to put them to work. Johnson admitted that he had been frequently solicited to aid unemployed men to get work and that he had in many instances been able to help men get employment at gambling houses, but he denied that he employed anyone to work in any of the gambling houses or that he assumed authority to get anyone to employ them. III. R. 952-954.

Four Government witnesses,—Anderson (II. R. 128-131), McGinnis (II. R. 135), Schultz (II. R. 235-240), and Schmidt (II. R. 336-337),—testified that they performed certain skilled labor at various gambling houses. All of these men testified that they were employed by Roy Love who was their boss. (II. R. 128, 134-135, 235, 336.) There is no evidence that any of these men received any directions from Johnson respecting their work in the gambling houses. Baker (II. R. 132-134) and Jones (II. R. 139) testified that they were employed as porters at gambling houses, and Corbin (II. R. 388-390), Bellamy (II. R. 250), Harvey (II. R. 262) and Kudesh (II. R. 381-382) testified that they were employed as drivers to drive patrons from gambling houses that had been closed to gambling houses which were in operation, and Thibert (II. R. 306-308) testified that he furnished bus service under similar circum-

stances, and Jungwirth (II. R. 265-266, 270-271) testified that he transferred furniture from one gambling house to another, and Hollander (II. R. 272) testified about storage and transfer service furnished certain of the gambling house operators. Not one of these witnesses testified that Johnson had anything to do with arranging for their employment or with directing them with respect to service rendered or with paying for the service.

Six Government witnesses,—Schumacker (II. R. 178), Cusack (II. R. 248), Ellis (II. R. 280), Lynch (II. R. 281), Hayes (II. R. 298), and Ogren (II. R. 329),—testified that they worked as sheet writers in many "horse books" enumerated by them, and they described in detail the manner in which bets on horses were made and recorded and paid in these places. Twenty-eight Government witnesses,—Anderson (II. R. 130), Cregar (II. R. 136), Cobb (II. R. 355), McGinnis (II. R. 135), Cieslik (II. R. 222), Greenberg (II. R. 233), Schultz (II. R. 240), Bingen (II. R. 254), Canfield (II. R. 256), Arndt (II. R. 263), Ellis (II. R. 279), Hayes (II. R. 293), Coote (II. R. 315), Fahy (II. R. 316), Harvan (II. R. 318), Lebbin (II. R. 322), Luria (II. R. 324), Masury (II. R. 327), Meyer (II. R. 328), Smith (II. R. 338), Leonard (II. R. 339), O'Leary (II R. 342), Ehrlich (II. R. 346), Kudesh (II. R. 382), Brenner (II. R. 383), Wolfson (II. R. 387), Brown (II. R. 396), and Singer (II. R. 397),— testified that they were employed as shills at various gambling houses at the different side games and many of them described in detail the playing of the gambling games where they worked and the work of a shill in keeping the games in operation with the owner's money until patrons came to gamble. None of these witnesses testified that Johnson fixed their hours or pay or duties.

Twenty-four Government witnesses,—Brenner (II. R. 383), Corbin (II. R. 388), Greenwald (II. R. 391), Cregar

(II. R. 135), Jones (II. R. 139), McGlynn (II. R. 192), Bonfield (II. R. 247), Bellamy (II. R. 250), Brown (II. R. 396), Cargett (II. R. 253), Bingen (II. R. 254), Canfield (II. R. 256), Harvey (II. R. 262), Arndt (II. R. 263), Ellis (II. R. 279), Lynch (II. R. 281), Fahy (II. R. 316), Harvan (II. R. 317), Luria (II. R. 324), Ogren (II. R. 329), Rowlett (II. R. 333), Smith (II. R. 337), O'Leary (II. R. 342), and Koenig (II. R. 373),—testified that they were employees in various gambling establishments and gave details of their employment, but did not mention Johnson's name and did not say that they had ever seen him or had ever had any contact with him.

There was no proof of defendant Johnson's connection with any of the telephone services or transactions. Two telephone men,—Acheson and Moore,—testified in great detail about installations and changes in telephone service from the service bureau at 2135 South Crawford (now Pulaski) and later from the service bureau at Irving Park and Milwaukee to various gambling houses. (II. R. 195-205, 208-215, 697-704.) Flanagan testified that the installations and changes in telephone service were made at his direction and at his expense. (III. R. 935.) Sommers and Creighton testified that they made their arrangements for telephone service with Flanagan. (III. R. 845, 860.) Flanagan testified that he was the sole owner of the service bureau and that neither Johnson nor any other defendant had any knowledge of his inauguration of the racing information service or of the customers he was serving from time to time, except as some co-defendant was a customer, and that neither Johnson nor any other defendant had any interest at any time in the service bureau. (III. R. 932.) Johnson testified that he had no connection with the establishment of the service bureau, no investment in it, no income from it, and no transactions concerning it. (III. R. 951.) Acheson testified that

he had no dealings with defendant Johnson in connection with this telephone service, (II. R. 205,) and Moore did not mention Johnson.

Five volumes, each recording 1,000 or more customers' accounts with the Nationwide News Service between 1934 and 1938, (Gov. Ex. O-11 to O-15) which were received in evidence, (II. R. 167,) showed no account identified with defendant Johnson. A former bookkeeper for Nationwide identified the books and said they showed transactions between Nationwide and its customers, (II. R. 148,) but he did not identify any of the accounts with a defendant on trial. Another former employee testified that defendant Johnson did not have an account with Nationwide. (II. R. 161.) He testified that there was a conversation between him and one Ragen and Flanagan at the Nationwide offices in 1938 relating to the rate charged Flanagan for his service. (II. R. 153.) He said there might have been a second conversation with Flanagan about a week later but that he could not recall because he had very little to do with the Flanagan account after the first conversation. The Court then permitted the prosecutor to cross-examine his own witness and in response to a leading question he stated that he believed there was a third conversation where defendant Johnson was present. He could not recall whether Johnson was present and stated that he did not think he was. (II. R. 154.) It was in his statement to Stains, and not in his testimony at the trial, that the witness stated that Johnson argued that the rates should be lower because customers were drawn into the places under discussion by other gambling games. (II. R. 157.) On cross-examination he stated that Flanagan was a subscriber of Nationwide News Service and that his account had been on the Nationwide books at least ten years and that his dealings were always with Flanagan. (II. R. 161.) Later, on cross-examination, he stated that Johnson was not pres-

ent when the conversation between Ragen and Flanagan took place at the Nationwide offices. (II. R. 164.) When cross-examined about his statement to Stains he said he had never told anybody that defendant Johnson had any conversation with him about the Flanagan account until he made his statement to Stains, when he was interviewed a few days before he went on the stand. (II. R. 165.) Johnson testified that he had no interest in the charges that were being made to Flanagan and he denied that he undertook to adjust a dispute between Flanagan and Nationwide. (III. R. 952.) Flanagan testified that he had many controversies over the charges that were being made for services furnished to him and that he frequently visited the Nationwide offices but that Johnson was never there with him and had no interest in the matter. III. R. 937-938.

There was no evidence connecting Johnson with any of the numerous banking and currency exchange transactions of his co-defendants. Tellers of the Northern Trust Company testified that around 1934 Sommers began transacting business with the bank, that thereafter he came in frequently to cash checks, (II. R. 503, 507,) and that occasionally he brought in worn currency and exchanged it for new 5's, 10's and 20's and a few larger bills. (II. R. 504, 508.) There is no proof of the *amount* of currency exchanged, but a special paying teller testified that he exchanged currency for Sommers approximately eighteen times a year during 1936, 1937, 1938 and the first half of 1939; that Sommers would bring old $5, $10 and $20 bills amounting to around $5,000 and would take out about $3,000 in new 5's and about $2,000 in new 20's and that sometimes he would take $100 bills instead of 20's. (II. R. 604.) No record of these transactions was kept by the bank, but it was estimated that they aggregated about $100,000 a year. (II. R. 605.) On cross-examination the teller stated that he did not know whether the same $5,000 bank roll was

handled eighteen times a year or whether there were eighteen $5,000 bank rolls involved each year. (II. R. 605.) The Northern Trust Company tired of giving Sommers free service and around June 1936 he made arrangements to cash his checks at the Albany Park Currency Exchange at the rate of 2½¢ a $100. (II. R. 476.) The manager testified that the checks on his records designated by the initials "J. S." were those of Sommers and that the checks designated by the initials "M.D." were those cashed by one Downey who was introduced to him by Sommers. (II. R. 480-484.) He kept no record of the amount of new currency exchanged for old, but he said that most of the cash deposits shown by his deposit slips at the Milwaukee Avenue National Bank represented currency exchanged for Sommers. (II. R. 485-487, 492.) Downey brought in checks in a package marked "L. T." which Marcus thought meant "Lincoln Tavern," and in a package marked "D.D." which he thought meant "Division and Dearborn." (II. R. 493.) Lincoln Tavern, which was in the country northwest of Chicago, was operated by Hartigan, and the D. & D. Club was operated by Kelly in a building at Division and Dearborn. Around July 1938 Sommers, Hartigan and Kelly transferred their business from the Albany Park Currency Exchange to the Lawrence Avenue Currency Exchange, operated by co-defendant Brown. This exchange first got its service at the North Shore National Bank and between July 21, 1938, and August 16, 1938, the bank furnished the exchange approximately $85,000 in currency, most of which was in $100 bills. (III. R. 606.) Thereafter the exchange did its business with the Central National Bank and a special teller testified that the exchange placed orders for between $3,000 and $5,000 in currency nearly every day between July 1938 and September 1939. The currency order was for various denominations, from $100 bills to singles. (III. R. 611.) An accountant testified that he set up a bookkeeping system for the Lawrence Avenue Cur-

rency Exchange and that there was one account called "Reserve for Uncollected Funds" to which were credited all checks presented on which cash was not paid out immediately. (III. R. 535.) During the fifteen months the exchange operated the total turn-over of currency amounted to $2,600,000, of which about $1,100,000 passed through the "Reserve for Uncollected Funds" account. The accountant said Brown referred to this account as the "Johnson Account" but no given name was mentioned and that he did not know what Johnson Brown was talking about. (III. R. 542.) Creighton did his business with the Mid-City National Bank. (III. R. 516.) A Government agent spent about five weeks examining with a magnifying projector the Recordak films which recorded the checks cashed over the counter by the bank, and then testified on the trial to the total amount of checks which he found from this examination bore the endorsement of Creighton. (III. R. 714-726.) Flanagan cashed checks and exchanged currency at the Lawndale Currency Exchange. The manager had no idea how much the transactions totalled. (III. R. 552-559.) *There was no proof of the amount of money actually involved in all of these transactions and no proof that defendant Johnson had any connection with any of the transactions or received a dollar of the money.*

Two accountants testified respecting the preparation of income tax returns for defendants. Brantman prepared returns for defendant Johnson from 1925 to 1935, (II. R. 419,) and Radomski prepared them for 1936 and thereafter. (II. R. 101.) Brantman prepared returns for other defendants and for many other gamblers and he suggested the phrase "Miscellaneous Speculative Income" as an appropriate description of the source of income. (II. R. 437-453.) He admitted that he was making returns for 300 or 350 persons each year. (II. R. 446.) After an over-night recess Brantman testified, on further examination with respect to the meeting at the Horse-Shoe Club in 1932, that

Johnson, in introducing Sommers, said, "Meet my man Sommers," (II. R. 429,) but on cross-examination he admitted that just preceding the trial he had had about six conferences with the prosecuting attorneys and altogether he was interviewed twelve or fifteen times over the period of the year of the investigation of this defendant (II. R. 436); that he could not remember with any accuracy when conversations took place or what was said (II. R. 435); that Barnes was running the Horse-Shoe Club at the time of these conversations and he had been making out returns for Barnes and that it might have been Barnes, not Johnson, who introduced him to Sommers. (II. R. 440.) Brantman attached no significance to his suggestion to Johnson to advise other gamblers that they should file returns. He knew Johnson had friends all over town and he thought he was doing a friendly act when he suggested that Johnson warn his friends, because he knew there was a change of policy in Washington regarding returns of those engaged in illegal pursuits. (II. R. 438.) He had no occasion to be warning Johnson because Johnson had been filing returns for more than ten years. Brantman denied on cross-examination that it had been suggested to him in the many conversations he had with the prosecutors and agents that his license to practice before the Department of Internal Revenue was in jeopardy if he did not testify to suit the prosecution, but he admitted that they told him that as a man admitted to practice before the Treasury Department he was looked upon as the equivalent of a Government representative and should conduct himself accordingly. II. R. 453.

The foregoing is a summary of the principal evidence relating to the question of Johnson's ownership of a group of gambling houses and to the question of the amount of Johnson's income under the theory that he owned these places.

Evidence Under Second Theory.

The Government also attempted to show that Johnson's taxable income exceeded his reported income by some undetermined amount, by the indirect method of proving cash expenditures which it claimed he made.

For the years 1932 to 1935, the period immediately preceding the period covered by the indictment, the total expenditures, as computed by the Government, were as follows: (III. R. 766)

1932		
1.	Federal income taxes	$ 8,841.11
2.	Payments relative to Lincoln Park Building	7,000.00
1933		
3.	Federal income taxes	8,610.10
4.	Payments relative to Lincoln Park Building	38,000.00
1934		
5.	Federal income taxes and penalty	27,993.00
6.	Payments relative to Lincoln Park Building	65,311.93
7.	Furnishings Thorndale-Glenwood Bldg.	730.22
1935		
8.	Federal income taxes	41,373.56
9.	Payments relative to Lincoln Park Building	80,513.72
10.	Furnishings Thorndale-Glenwood Bldg.	326.00
	Total for four-year period	278,699.64

The following amounts represent corrections of the Government's figures as the result of defense testimony:

1932	
Deduct from Lincoln Park Building payments, credit shown by Gov. Ex. E-9 (III. R. 992)	2,250.00

Add interest paid on prior Federal taxes (II. R. 6)	117.56
Add payment on 4020 Ogden mortgage (III. R. 990)	500.00
1933	
Deduct from Lincoln Park Building payment discount on purchase of second mortgage notes (III. R. 957)	8,000.00
Add purchase of U. S. Bonds (III. R. 992)	5,000.00
Add payment on 4020 Ogden mortgage (III. R. 990)	8,500.00
Add payment on 2141 Pulaski mortgage (III. R. 990)	5,000.00
1934	
Deduct from Lincoln Park Building payments, excess of estimate of cost of equity (III. R. 956)	8,590.00
Net adjustment increases expenditures	367.56
Making total expenditures for four years	$279,067.20

For the year 1936 the total expenditures as computed by the Government were:

1. Federal income taxes (II. R. 7)	20,062.18
2. Payments re Lincoln Park Bldg. (Gov. Ex. R-10)	54,634.29
3. Furnishings Thorndale-Glenwood Bldg. (Gov. Ex. R-10)	124.00
4. Payments re The Dells (II. R. 59)	10,000.00
Total	$84,820.47

As to item 4, William Goldstein, who holds an attorney's license, testified for the Government that on November 22, 1936, he executed the escrow agreement contained in Government's Exhibit E-35, that the $10,000 which he deposited

with Chicago Title and Trust Company was received from Johnson in the form of currency and that the property was purchased at Johnson's request. (II. R. 59.) On cross-examination Goldstein identified defendants' Exhibit J-3 as in W. R. Skidmore's handwriting, but refused to admit it was a statement of account respecting the purchase of The Dells. (II. R. 66.) He admitted that the "Herman" named on the exhibit was the attorney that represented the seller. He presumed that the Goldstein mentioned, who got $750 out of this deal, was himself. (II. R. 67.) Defendant Johnson testified that he made no arrangements with Goldstein to purchase this property in 1936 or at any other time, but he joined Skidmore in the purchase of the property in 1937. Defendants' Exhibit J-3 is in the handwriting of Skidmore and is a memorandum of cost given to him by Skidmore at the time of the settlement. He first paid Skidmore $10,000 and later paid him a balance of $1,057.95. (III. R. 955.) In addition to the memorandum in Skidmore's handwriting (Def. Ex. J-3) and the two escrow agreements (Gov. Ex. E-35 and E-36), Johnson's testimony was corroborated by the testimony of lawyer Herman who testified that he represented the owners of The Dells in connection with the sale in 1936, that he talked with Goldstein and Skidmore at the latter's home, that he advised Skidmore that the price was $10,000 plus a fee for himself, that Skidmore said that was all right and asked Goldstein whether he wanted the cash then, that Goldstein suggested he deliver it to the Chicago Title and Trust Company the next day, that he and Goldstein entered into the escrow agreement, and that under the agreement Goldstein deposited the money and he deposited the deeds. (III. R. 926-927.) Herman testified that he never saw Johnson in connection with this transaction and that he did not know him then. (III. R. 927.) Item No. 4 should not be included in the 1936 expenditures. This leaves $74,820.47 as the total of expenditures for 1936.

For the year 1937 the total expenditures as computed by the Government were: (III. R. 764)

1.	Federal income taxes	$ 78,550.70
2.	Payments re Lincoln Park Building	16,274.00
3.	Furnishings Thorndale-Glenwood Bldg.	102.75
4.	Payments re The Dells	9,000.00
5.	Payments re 9730 S. Western Ave.	35,515.00
6.	Payments re Sunny Acres farm	266,511.14
7.	Purchase of Albany Park Bank Bldg.	59,887.05
	Total	$465,840.64

The following amounts represent corrections of the Government's figures as the result of defense testimony:

4.	Add to payment re The Dells (III. R. 955, 993)	$ 2,057.95
5.	Deduct from payments re 9730 S. Western Ave. (III. R. 955, 993)	17,757.50
6.	Deduct stock farm overcharge (III. R. 993)	4,908.30
7.	Deduct purchase of Bank Building (III. R. 955, 992)	59,887.05
8.	Add interest paid on added income tax	1,280.02
	Net adjustment decrease expenditures	$ 79,214.88
	Making total expenditures for 1937	$386,625.76

As explained above, the total cost of The Dells property was $22,115.90, and Johnson paid one-half of this in 1937. (III. R. 955.) Herman represented the seller in the two transactions and Goldstein represented the purchaser and paid the purchase price. III. R. 927.

Item 5, the payments relative to 9730 South Western Avenue, is based largely on the direct examination of Goldstein. He testified that he deposited the amounts of

the escrow agreements for the purchase of the lots, that he received the money from defendant Johnson and purchased the property at his request, and that the title was taken in the names of office associates who quitclaimed to Johnson. Goldstein testified on direct examination that he personally delivered these deeds to Johnson. (II. R. 56.) On cross-examination, when confronted with the deeds, Goldstein was forced to admit that Johnson got title to only an undivided one-half interest, (II. R. 64,) and that Skidmore was the owner of the other half interest. (II. R. 65.) The Government accountant ignored this testimony of Goldstein brought out on cross-examination. (III. R. 746.) Nadherny, an architect, testified that the total cost of the building at 9730 South Western Avenue was $22,400, and that Skidmore furnished the money. (II. R. 79.) The Government accountant ignored this testimony and charged the total to Johnson. (III. R. 746.) Johnson testified that he owned one-half of the property and that he contributed about $17,500 to the purchase of the land and the construction of the building. (III. R. 955.) Mrs. Homan testified that from January, 1927 to January, 1938 she was receptionist and general stenographer for William Goldstein and she identified Government's Exhibits E-69 and E-70 (deeds marked for identification as defendants' Ex. J-1 and J-2) as deeds which she signed at the request of William Goldstein. She testified that she did not know the grantee, William R. Johnson, when she made the deeds, and did not remember ever seeing him until the day she testified. She knew William R. Skidmore, who came into Goldstein's office on several occasions during the period she was working there. (III. R. 922.) The figure in Item 5 should be $17,757.50,—half of the total cost which was paid by defendant Johnson.

As to the payments relative to Sunny Acres Stock Farm, the $4,908.30 deducted represents an unlocated difference

between the computation of the defendants' and the Government's accountants. (III. R. 993.) There was no rebuttal of the testimony of the defendants' accountant as to what the farm account books showed.

As to the purchase of the Albany Park Bank building, Goldstein testified that he purchased the property at the request of Johnson for $59,887.05, that he took title in the name of Ted W. Goldstein, his son, and that subsequently there was a quitclaim deed delivered to Johnson by his son. (II. R. 57.) Johnson testified that he does not own the Albany Park Bank building or any part of it, that he did not employ Goldstein to buy the property for him, that he never gave him any money to make the purchase, that no deed was ever delivered to him, and that he knows nothing about the ownership of this property. (III. R. 955.) The title is still in Ted Goldstein and William Goldstein manages the building and collects the rents (III. R. 590, 599, 601) and presumably accounts to the owner. He has never accounted to Johnson. This item should be deducted.

For the year 1938 the total expenditures as computed by the Government were: (III. R. 764)

1. Federal income taxes	$128,399.72
2. Payments re Lincoln Park Bldg.	3,680.99
3. Furnishings Thorndale-Glenwood Bldg.	106.09
4. Payments re Sunny Acres stock farm	15,377.76
5. Payments re Bon-Air Country Club and Bon-Air Catering Company	368,997.66
6. Loan to Skidmore	37,000.00
Total	$553,561.32

The following amounts represent corrections of the Government's figures as the result of defense testimony:

4. Add unlocated difference re Sunny Acres (III. R. 993)	597.55
5. Deduct half of payments re Bon-Air (III. R. 957)	184,498.83
6. Deduct Skidmore loan (III. R. 993)	37,000.00
Net adjustment decreases expenditures	$220,901.28
Making total for 1938	$332,660.04

Item 5 represents expenditures relative to the Bon-Air property. (III. R. 764.) These expenditures during 1938, and many more during 1939, were included in the Government's estimate of Johnson's expenditures on the theory that Johnson was the *sole* owner of the Bon-Air Country Club and the Bon-Air Catering Company.

Johnson testified that he owned only half of the Bon-Air Country Club and that William R. Skidmore owned the other half, and that he and Skidmore owned in equal shares 55% of the Bon-Air Catering Company, and that each contributed equally to the expenditures at Bon-Air. (III. R. 956.) Becker, a witness for the Government, testified that the original $75,000 payment was made by Goldstein (III. R. 574), that Goldstein negotiated the deal and wrote a letter to Becker (Defendants' Exhibit J-6) which stated he was representing "clients." (Note the plural.) Becker had no contact or dealings with any other person than Goldstein. (III. R. 575.) Bibow, an agent for the seller, said Goldstein told him that before the deal could be closed he would have to see "a couple of other people." (III. R. 576.) Goodsell, an accountant, testified that in the fall of 1939 Johnson instructed him to take certain construction and equipment items pertaining to buildings and grounds off the books of the catering company. (II. R. 54.) Johnson testified that these items represented advancements made

by him and Skidmore for fixed improvements in 1938 and that they were entered on the catering company books by mistake. (III. R. 964.) Johnson testified that he did not arrange with Goldstein in September, 1937, or at any other time, to negotiate for the purchase of the property, and that he never gave Goldstein any money at any time to pay for the property. (III. R. 955.) He said he learned about the purchase in the latter part of December, 1937, when Skidmore told him and Wait that he had purchased Bon-Air. Johnson joined Skidmore in the purchase and he and Skidmore contributed equally to the purchase price of the property and to the payment of the expenditures for improvements and operation. (III. R. 956.) Goldstein took title to the real estate in Johnson's name and recorded the deeds before he delivered them to Johnson and Johnson delivered to Goldstein quitclaim deeds conveying a half interest to Skidmore. (III. R. 963-964.) Johnson identified defendants' Exhibits J-11 and J-12 as certificates of title to trucks owned by the Bon-Air Country Club which bear the signature of William R. Skidmore. (III. R. 956.) Since the Curran farm was acquired as a part of Bon-Air, Skidmore has operated it. III. R. 960.

Johnson is strongly corroborated. Wait testified that he learned that the club had been acquired by Skidmore some time in the middle of December, 1937, that he became the manager in 1938 for Skidmore and Johnson, that during the operation of the club Johnson would be there nearly every day and night for two or three hours and Skidmore would be there a couple of times a week, and that he got the money to pay the bills from Johnson and Skidmore, who were supposed to contribute half and half, but he didn't know exactly the amounts contributed by each. (III. R. 896-898.) Nadherny, the architect, testified that part of his fees was paid by Skidmore and part by Johnson. (II. R. 81.) Joseph Spagat testified that in April, 1938, he began work

at Bon-Air as catering manager and that both Johnson and Skidmore participated in the operation and management of the Club. (III. R. 893-894.) Samuel Hare testified that in the early part of 1937, as agent for Skidmore, he had some negotiations with the agent for the bondholders with respect to the purchase of Bon-Air. (III. R. 914.) Later he took William Goldstein to Becker to discuss the deal and Goldstein said that if the bondholders made up their minds to take $60,000 he would put the money up in escrow. Hare had no further part in the negotiations. (III. R. 915.) Rex Davis, the painting contractor, testified that during his work there he saw Skidmore around the premises two or three times a week inspecting the construction that was going on, and that he had a conversation with Skidmore and Johnson and Wait about their family name shields that were placed in the bar at Bon-Air. During the three months he was working at Bon-Air he saw Skidmore talk with Johnson, Wait and Nadherny. (III. R. 916.) Robert Goldberg, who did the electrical work at Bon-Air in 1938 and 1939, testified that he saw Skidmore there on numerous occasions and had conversations with him pertaining to the work he was doing there. On one occasion Wait gave him $2,500, which was part of $5,000 that Skidmore gave Wait in his presence on the roof of the club. (III. R. 916-917.) William R. Thele, formerly vice-president of Durand-McNeil-Horner Company, wholesale grocers, testified that his concern did business with Bon-Air Catering Company beginning in May, 1938, and he identified defendants' Exhibit J-7(a-e), (five ledger sheets of Durand-McNeil-Horner Company headed, "Skidmore and Johnson, Bon-Air Country Club, Wheeling, Illinois"), as records kept in the regular course of business. (III. R. 919-920.) Albert Tatge, who formerly owned the property known as the "Greenhouse" at Bon-Air, testified that when he sold the house there was a pool table in the basement which Skidmore bought and told him to leave. (III. R. 922.)

Fred Boeye, the greens keeper, testified that his duties kept him out on the grounds, but he would see Skidmore on the grounds occasionally when he was around the buildings. The grass seed that was used on the club property was delivered by Skidmore's Lawndale Scrap Iron Company trucks and he saw the same trucks haul corn from the Curran farm, which was part of Bon-Air. Skidmore's farm manager got gasoline at Bon-Air to operate Skidmore's trucks, which bore the name "Pine Tree Farms," and his tractors. His crew hauled some peat moss from Skidmore's farm to the club at the direction of Skidmore. In 1938 Pine Tree Farms' trucks hauled about 250 yards of sand to the club's golf course. (III. R. 925.) Sam Rose, employed at the Bon-Air Country Club during the seasons of 1938, 1939 and 1940 as dance producer and director of shows, testified that he consulted with Skidmore and Johnson relative to the shows which he produced and the price of the acts. (III. R. 923.) Fred Meyer testified that while he was doing cement work at Bon Air he used to see Skidmore around the place once in a while and that in the fall of 1937 he was sent down to The Dells to help tear down some old buildings, and that the salvaged lumber was loaded onto Pine Tree Farms trucks. (III. R. 928.) Earl R. Allan testified that he is in the sales department of the Sinclair Refining Company and that the group of defendants' Exhibits J-9(a) to J-9(bbb), (invoices of Sinclair Refining Company headed "Bon-Air Country Club, W. R. Skidmore, Wheeling, Illinois"), were delivery tickets prepared by the driver at the time of delivery (III. R. 929), and that purchases for Bon-Air were under the same quantity discount contract as for Skidmore's Pine Tree Farms and the Lawndale Scrap Iron Company. III. R. 930.

On this uncontradicted evidence of Skidmore's interest in Bon-Air, this defendant bases his contention that only one-half of the Bon-Air expenditures should be charged to him.

The loan to Skidmore which was outstanding at the time of defendant Johnson's statement to the Revenue Agents on March 27, 1939 (II. R. 411), should be deducted from the 1938 expenditures because the loan was not made until 1939 and was paid the same year. III. R. 957, 993.

For the year 1939 the total expenditures as computed by the Government were: (III. R. 764)

1.	Federal income taxes	$ 34,530.94
2.	Payments re Lincoln Park Bldg.	2,356.27
3.	Payments re Sunny Acres	1,087.04
4.	Payments re Bon-Air	291,955.07
5.	Expenditures re Columbian Gardens	17,500.00
	Total	$347,469.32

The following amounts represent corrections of the Government's figures as the result of defense testimony:

3.	Add to farm expenditures (III. R. 993)	17,609.70
4.	Deduct from payments re Bon-Air (III. R. 957)	122,671.40
5.	Deduct expenditures re Columbian Gardens lots (III. R. 957, 993)	17,500.00
	Net adjustments decrease expenditures	$122,561.70
	Making total expenditures for 1939	$224,907.62

The additions to farm expenditures represent the purchase or construction of items capitalized, purchase of stock cattle, etc., and personal items paid. (III. R. 993.) After Johnson moved to his farm in 1937, his living expenses were reflected in his farm accounts.

Expenditures relative to Bon-Air Country Club and Bon-Air Catering Company are based on the books of Bon-Air Catering Company, and the testimony of the following witnesses who testified that they or the company which they

represented supplied services, material and labor at Bon-Air and were paid therefor: Nadherny (II. R. 84), Yaseen (II. R. 90), Anderson (II. R. 92), Wendt (II. R. 122-124), Goldberg (II. R. 140), Davis (II. R. 142), Kerr (II. R. 143), Fisher (II. R. 144), Paulson (II. R. 145), Star (II. R. 168), Reedy (II. R. 170), Cervenka (II. R. 228), Kling (II. R. 230), Boras (II. R. 231). Alguire (II. R. 259), deBettencourt (II. R. 232), Huffman (II. R. 259), Huston (II. R. 260), Leichsenring (II. R. 261), Schafer (II. R. 274), Hardin (II. R. 308), Nechin (II. R. 313), Wheeler (II. R. 45, 392). Nadherny only, of these witnesses, testified he was paid by Johnson. The only proof that Johnson made any of these expenditures, except the few payments to which Nadherny testified, is his own testimony that he made half of all that were made at Bon-Air.

To Government's Item 4 should be added $69,007.27, which represents additional expenditures, to bring the total to the amount of $730,000, which Johnson testified was the approximate total cost. From the same item should be deducted $22,355, which was profit from gambling paid to Skidmore and Johnson as partial reimbursement for advancements made to the catering company. From this net should be deducted $169,323.67, representing one-half of the total net advances which were made by Skidmore. II. R. 957.

As to the Columbian Gardens purchase, William Goldstein testified that he deposited $10,000 in currency with the Chicago Title & Trust Company in connection with the purchase of land adjoining the Curran farm and $7,500 with the State Bank & Trust Company in connection with the purchase of other lots in the same vicinity, and that he received the money from Johnson and made the deposits at his request. (II. R. 60-61.) The contracts show Goldstein was the purchaser. Goldstein indicated to Bibow of the State Bank that "a couple of other people" were in-

terested as purchasers. (III. R. 576.) Johnson testified that he did not furnish Goldstein with the $17,500 deposited, that he did not authorize Goldstein to purchase these parcels of land, that he knew nothing about the contracts of purchase, and did not know to what lands they referred. III. R. 957.

This concludes the explanation of the adjustments as to expenditures.

Cash Accumulations.

In computing defendant Johnson's total available cash for the purpose of comparing it with his expenditures, the Government used January 1, 1932, as a starting point. Government Agent Wilson testified that on January 26, 1934, he asked defendant Johnson how much cash he had on December 31, 1931, and that Johnson said he had his bankroll of $10,000 and $68,000 in accumulated gambling profits in a safety deposit box. (II. R. 10.) Johnson explained that during the course of that conversation with Agent Wilson an item of $78,000 plus, which appeared on his 1931 return as gambling gain, was discussed and that in reply to Wilson's inquiry as to what he did with that money he told Wilson that he carried about $10,000 of it as his bankroll and that the rest was put in his box. Johnson testified that he did not tell Wilson that the $68,000 he said he put in his box was the only cash that was in the box, and that it was not the only cash he had there at that time. He estimated he had between $140,000 and $150,000 in his box at the end of 1931, in addition to the $68,000 he added that year. (III. R. 960.) He had reported large income for ten years before 1931 and had accumulated cash.

Johnson's accumulations of cash from year to year after 1931 as shown by the evidence were:

1932

Total reported net cash income (Gov. Ex. R-6) ..... $ 74,553.85

1933	
Total reported net cash income (Gov. Ex. R-7)	80,079.85
Collection on Judd mortgage (III R. 960)	83.51
Collection on Horner mortgage (III. R. 960)	2,000.00
1934	
Total reported net cash income (Gov. Ex. R-8)	142,125.43
Non-taxable interest on U. S. Government securities	162.50
Collection on Judd mortgage (III. R. 960)	515.91
Collection on Horner mortgage (III. R. 960)	2,000.00
Collection on Joint Stock Land Bank bonds (III. R. 960)	1,500.00
1935	
Total reported net cash income (Gov. Ex. R-9)	$ 68,211.14
Non-taxable interest on U. S. Government securities	162.50
Collection on Judd mortgage (III. R. 960)	1,576.18
Collection on Horner mortgage (III. R. 960)	2,000.00
Collection on Joint Stock Land Bank bonds (III. R. 960)	1,500.00
Total for the four-year period	$376,470.87
1936	
Total reported net cash income (Gov. Ex. R-10)	$173,220.40
Non-taxable interest on U. S. Government securities	162.50
Collection on Judd mortgage (III. R. 960)	4,966.37
Collection on Horner mortgage (III. R. 960)	2,000.00
Collection on Joint Stock Land Bank bonds (III. R. 960)	500.00
Total	$180,849.27

1937

Total reported net cash income (Gov. Ex. R-11)	$264,015.13
Non-taxable interest on U. S. Government securities	162.50
Collection on Judd mortgage (III. R. 960)	3,448.71
Collection on Horner mortgage (III. R. 960)	2,000.00
Collection on Joint Stock Land Bank bonds (III. R. 960)	125.00
Total	$269,751.34

1938

Total reported net cash income (Gov. Ex. R-12)	$120,975.15
Non-taxable interest on U. S. Government securities	162.50
Collection on Judd mortgage (III. R. 960)	8,331.10
Collection on Horner mortgage (III. R. 960)	2,000.00
Collection on Joint Stock Land Bank bonds (III. R. 960)	125.00
Total	$131,643.75

1939

Total reported net cash income (Gov. Ex. R-13)	$268,885.98
Non-taxable interest on U. S. Government securities	162.50
Collection on Judd mortgage (III. R. 960)	1,028.22
Collection on Joint Stock Land Bank bonds (III. R. 960)	150.00
Total	$270,226.70

Cash Available and Expenditures.

Therefore, assuming Johnson had $218,000 at the beginning of 1932, as he estimated, and that he had no other cash accumulations than those proved, and allowing an amount of $10,000 a year to cover living expenses, above the personal expenses shown by his farm accounts, Johnson had (III. R. 994) for the period 1932 to 1935, inclusive:

Total net cash available	$594,470.87
Total cash expenditures	319,067.20
Balance of available cash at end of 1935	$275,403.67
1936	
Available cash at beginning of year	$275,403.67
Net available cash receipts	180,849.27
Total available cash	$456,252.94
Total cash expenditures	84,820.47
Balance of available cash at end of 1936	$371,432.47
1937	
Available cash at beginning of year	$371,432.47
Net available cash receipts	$269,751.34
Total available cash	$641,183.81
Total cash expenditures	$396,625.76
Balance of available cash at end of 1937	$244,558.05
1938	
Available cash at beginning of year	$244,558.05
Net available cash receipts	131,643.75
Total available cash	$376,201.80
Total cash expenditures	342,660.04
Balance of cash available at end of 1938	$ 33,541.76

1939

Available cash at beginning of year	$ 33,541.76
Net available cash receipts	270,226.70
Total available cash	$303,768.46
Total cash expenditures	234,907.62
Balance of available cash at end of 1939	$ 68,860.84

SUMMARY OF ARGUMENT.

I.

The Circuit Court of Appeals was right in holding that the District Court erred in overruling the motion to quash. The grand jury which returned the indictment was without authority to act when the indictment was returned.

A. The order of February 28, 1940 did not conform to the only statute authorizing the continuance of the grand jury and the grand jury ceased to exist with the adjournment of the February Term. Section 421, Title 28, U. S. Code, is explicit in its requirements and is clearly designed to prohibit a grand jury from continuing to sit after the expiration of the term at which it was impanelled except to finish investigations (a) which were begun at the original term and (b) which were not finished at the original term or at a succeeding term at which the grand jury was legally authorized to sit. The order of February 28 in terms authorized the grand jury to continue to sit during the March 1940 Term, not *solely* to finish investigations begun but not finished during the December 1939 Term, but also to finish investigations begun during the February 1939 Term. This order was not in conformity with the statute and was void. The legal

existence of the grand jury terminated with the February Term of court. The body of citizens purporting to act as a grand jury at the March Term had no authority to act.

B. The December 1939 grand jury began new investigations at the March 1940 Term and as a result thereof returned counts 4 and 5 of the indictment which relate to events which did not occur until March 15, 1940. No grand jury in December 1939 or in February 1940 could anticipate that a crime would be committed on March 15, 1940 and return an indictment charging such an offense. The word "investigations" as used in Section 421, Title 28, U. S. Code, cannot be construed to broaden a grand jury's authority to include inquiry concerning offenses which may be committed in the future, or which may never be committed, as well as offenses already committed.

C. The December 1939 grand jury sitting at the February 1940 Term finished its investigation with respect to the subject matter of counts 1, 2 and 3 at the February 1940 Term and returned an indictment of three counts identical with the first three counts of the indictment herein, charging this defendant with an attempt to evade income taxes for the years 1936, 1937 and 1938. Since the grand jury had finished its investigation with respect to these matters there was no authority under Section 421, Title 28, U. S. Code, to continue the grand jury to the March 1940 Term for further investigation as to such matters.

D. The verified motion to quash alleged facts, not mere conclusions. It is specifically alleged that no investigation of the matters covered by counts 4 and 5 of the indictment was begun at the December 1939 Term and that the investigation of said matters was first begun at the March 1940 Term. It is likewise specifically alleged that the investigation of the matters covered by counts 1, 2

and 3 was finished at the February 1940 Term. The motion to quash challenged the authority of the District Judge to continue this grand jury under these circumstances. The statute limited the authority of the District Judge to continue the grand jury "solely to finish investigations begun but not finished by such grand jury." As to counts 4 and 5, the investigations were not begun at the original term, and as to counts 1, 2 and 3, the investigations were finished at the second term. There was no authority to continue the grand jury to the third term.

E. It must affirmatively appear from the record in a criminal case that every step necessary to the validity of the indictment has been taken before a valid sentence can be entered. There is no presumption that the December 1939 grand jury had authority to return an indictment at the March 1940 Term of court. Where there is a direct challenge of the authority of a grand jury to act at a term succeeding its term of organization, as there is in this case, the record must disclose facts from which it can be determined that the grand jury is a legal body acting within the limitations which Congress has definitely and plainly fixed.

II.

The demurrer to the indictment should have been sustained. There is lacking in each count of the indictment the essential jurisdictional allegation that the investigation begun at the December 1939 Term had not been finished at the February 1940 Term. Under Section 421, Title 28, U.S. Code, a grand jury may be continued *solely* to *finish* investigations *begun* but *not finished* by such grand jury. If the investigation in this case was finished at the February Term as to the matters charged in the indictment herein, or any of them, then there was no authority to continue the grand jury to the March Term

as to such matters. This challenge to the indictment goes to the jurisdiction of the District Court. There is no presumption that the December 1939 grand jury had authority to return an indictment at the March 1940 Term. The presumption is directly to the contrary. A Federal grand jury is a creature of statute and can have only the existence authorized by statute. Counts 2, 3, 4 and 5 of the indictment make no allegation of any character with respect to the organization or continuance of the December 1939 grand jury. Except where it is continued as provided by law, a grand jury has no existence beyond the term for which it was impanelled. The omission to allege in the indictment the necessary jurisdictional facts renders the indictment void.

The first four counts of the indictment are repugnant in that they allege an attempt on a day certain and then allege acts which amount to an attempt on various other days or which continued over a long period of time. The first four counts are duplicitous in that they each charge four distinct offenses,—to-wit: the offense charged by Section 145(b) which carries a maximum penalty of a $10,000 fine and imprisonment for five years, and three offenses covered by Section 145(a) which carries a maximum penalty of a $10,000 fine and imprisonment for one year.

III.

The evidence did not establish the guilt of defendant Johnson under any count of the indictment and a verdict of not guilty should have been directed as to each count. We assert with confidence that there is no competent evidence which supports the charge that defendant Johnson wilfully attempted to evade the payment of income taxes for any year involved, either on the theory that he owned a group of gambling houses and derived income therefrom

or on the theory that his expenditures exceeded what he had available according to his returns and his admitted assets. Under the Government's first theory the case rests on circumstantial evidence alone, and it is by mere conjecture that this defendant is made the owner of a group of gambling houses and charged in any year with an amount of income in excess of that which he reported. There is a total failure of proof that Johnson was the sole owner of the gambling houses, or of the amount of income from any gambling house mentioned, or that Johnson received a dollar of this income. There is likewise a total failure of proof under the expenditure theory that Johnson spent more money in any year involved than he had available for expenditure. The Government entirely ignores the annual periods fixed by the Internal Revenue Act for reporting of income, and it seeks to lump together the whole eight-year period covered by the returns received in evidence. The most that can be said for its proof is that in some year, not identified, Johnson did not report all of his taxable income. There was no proof of net worth in any year. Mere proof that expenditures in a particular year exceeded the amount of income reported, without proof that the taxpayer was without other resources, is not proof that the taxpayer failed to report all of his taxable income for that year. The conspiracy count rests on identically the same foundation as the substantive counts and the conviction thereon must be reversed for lack of evidence to support the charge.

IV.

This defendant was denied a fair trial. If this Honorable Court concludes that the judgment of the Circuit Court of Appeals should be affirmed on any of the grounds argued under the first three divisions of our brief, then it will be unnecessary to consider the errors on the trial. But if

this Court should conclude that there is a valid indictment and that there is some substantial evidence in the record on which the jury might reasonably have based its verdict as to some count, then we earnestly submit that the many errors committed in the admission of incompetent and immaterial evidence and by the improper cross-examination of the defendants and their witnesses denied to this defendant that fair and impartial trial which is the boast of the American system of criminal justice.

A. Agent Clifford was permitted to weight the evidence and express his conclusion on the ultimate questions to be decided by the jury. Clifford was not asked to state the amount of the financial transactions with respect to the gambling establishments for each year. He was asked to state how much income defendant Johnson received in each year. It was for the jury to decide the amount of Johnson's income in 1936, 1937, 1938 and 1939, after consideration of all the evidence. Before the jury could reach the conclusion that the banking and currency exchange transactions should be considered in determining the amount of Johnson's income, it had to decide whether there was evidence justifying the conclusion that the gambling house operators were mere employees of Johnson and that all of the money handled by them represented taxable income of Johnson. This was no problem for an accountant. The conclusion as to the amount of the taxable income of Johnson for any particular year could be determined only by considering all the facts and circumstances in evidence, and by weighing the testimony of scores of witnesses. A question which submits to an "expert" the credit to be given to the testimony of witnesses invades the province of the jury. Our objection is not to the form of the question submitted to this expert. It goes much deeper. He was asked to determine the ultimate question of the amount of taxable income received by Johnson in each of the years involved, and then to state his conclusion to the jury.

B. The evidence of the financial transactions of the co-defendants was hearsay as to Johnson and highly prejudicial. There was no proof of the total of money involved in these transactions, and yet the aggregate of the transactions furnishes the sole basis for the amount charged. There was no proof that this defendant had any connection with any of these transactions or that a dollar of the money ever reached him. We submit that the admission of this evidence must reverse the judgment.

C. The government, in its attempt to prove that Johnson was the owner of the gambling houses operated by the other defendants, introduced the testimony of scores of witnesses connected with the operation of these gambling houses. Many of these witnesses had no contact with Johnson at all and most of the others merely saw him visiting the various gambling houses. A great quantity of books and records containing prejudicial hearsay was received in evidence. In no instance was Johnson identified with these documents by direct evidence. It was prejudicial hearsay.

D. Johnson was prejudiced by a mass of evidence relating to acts of other defendants wholly unconnected with him. This included the individual income tax returns of various co-defendants, the details of the activities of the gambling house operators, the destruction of records and files in their respective gambling houses, the losses of gamblers who played in these houses, and the difficulty of the government agents in locating some of the co-defendants for interrogation about their knowledge of Johnson's affairs.

E. It is not possible to measure the damaging effect of this immaterial and improper evidence. The presumption is that it influenced the jury against the defendant. It has been held that a conviction in a criminal case should not be affirmed unless it is made to appear beyond a doubt that the improper evidence submitted did not prejudice

the rights of the accused. Even bad men are entitled to a trial on competent evidence and according to law.

F. The defendants were subjected to improper cross-examination by the prosecuting attorneys and by the Court. It was implied repeatedly that this defendant had bribed public officials for protection of himself and others engaged in operating gambling houses. The same implication was carried into questions put on the cross-examination of co-defendants. Since the prosecutor cross-examined to degrade the defendant and prejudice him with the jury, he cannot be heard to say that the cross-examination did not do what he intended it should do.

G. This defendant was prejudiced by improper rebuttal offered to impeach on immaterial matters injected into the case on cross-examination of defendants. This rebuttal testimony distracted the attention of the jury from the issues of the case. Occurring at the end of the trial, as it did, and being contradictory of matters brought out on the cross-examination of this defendant, it left the jury with a fresh impression that he had testified falsely with respect to these collateral matters, and it impaired, if it did not destroy, the effect of his testimony on matters that were material to the issues.

H. The motion for mistrial should have been granted. There was no other way open to assure defendants a fair trial after the misconduct of the prosecutors and the erroneous rulings of the court created an atmosphere of general criminality.

I. Exhibits not identified with defendant Johnson, and containing immaterial matter and highly prejudicial hearsay should not have been sent with the jury on retirement. The sending of the truckload of exhibits to the jury room was an invasion of the privacy of the jury and a denial of this defendant's constitutional right to be confronted with the witnesses against him.

ARGUMENT.

I.

The Circuit Court of Appeals was right in holding that the District Court erred in overruling the motion to quash. The grand jury which returned the indictment was without authority to act when the indictment was returned.

A. The order of February 28, 1940, did not conform to the only statute authorizing the continuance of the grand jury and the grand jury ceased to exist with the adjournment of the February Term.

The Government does not contest the proposition that a grand jury, in order to have legal authority to act at a term subsequent to the term at which it is impanelled, must have been authorized to continue to sit by an order of a district judge, in conformity with Section 421, Title 28, U. S. Code. Neither does the Government dispute the proposition that this statute empowers a district judge only to authorize a grand jury to continue to sit through a term subsequent to the term at which it is empanelled solely to finish an investigation commenced during the original term. This statute is explicit in its requirements and is clearly designed to prohibit a grand jury from continuing to sit after the expiration of the term at which it was impanelled, except to finish investigations (a) which were begun at the original term and (b) which were not finished at the original term or at a succeeding term at which the grand jury was legally authorized to sit.

The question presented here does not involve an interpretation of Section 421, Title 28, U. S. Code, since the

plain meaning of that section is conceded by the Government. The question is: Did the order of the District Judge purporting to authorize the December 1939 grand jury, which by a previous order was sitting at the February 1940 Term, to continue to sit during the March 1940 Term, conform to said statute, or did it violate the statute by purporting to authorize this December grand jury to continue to sit at the March Term to finish investigations begun at the February Term? The determination of this question turns upon the language of the order.

The order of February 28, 1940, which is the sole basis of the authority of the grand jury to continue to sit at a third term, recites that the grand jury in open court requested that an order be entered authorizing the grand jury "heretofore authorized to sit during the February 1940 Term of this Court to continue to sit during the term of court succeeding the February Term of court, to-wit: the March 1940 Term of court to finish investigations begun but not finished by said grand jury during the said December 1939 and the said February 1940 Terms of this Court and which said investigations cannot be finished during said February 1940 Term of court," and then concludes, "It is therefore ordered that the second December 1939 grand jury * * * be and it is hereby authorized to continue to sit during the March 1940 Term of court for the purpose of finishing said investigations." I. R. 28-29.

The order, in language too plain to require interpretation, authorizes the December 1939 grand jury to finish at the March 1940 Term investigations begun during the February 1940 Term of court. Under the statute, a "district judge may * * * by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, * * *." The Court had the power to continue the December grand jury

to finish investigations begun by it only at the December Term. The order authorizing the December grand jury to consider at the March Term matters which it began to investigate at the February Term is beyond the power of the Court and is void. Without an order of court, in strict compliance with the statute, extending the life of this grand jury, the grand jury ceased to exist with the adjournment of the February Term and no valid indictment could be returned at the March Term.

What we have said is in substance the holding of the Circuit Court of Appeals. (I. R. 184.) It is submitted that no one reading the plain language of the order could construe it as having any other meaning than that given to it by the Circuit Court of Appeals. Even Government counsel do not suggest that, taken by itself, the order can be given any other meaning. They seek to avoid the effect of the clear language of the order by arguing, (their brief, 28,) without support in the record, that the Judge entering the order did not contemplate that any new investigations had been begun in February that were to be continued into March, and that no new investigations had in fact been begun in February, and that the grand jury by a preamble to the indictment has stated that it did not begin any new investigations in February. To sustain these excuses is to announce that it is not necessary for the record to show affirmatively that a grand jury has authority to act at the term at which it returns an indictment, even where the grand jury is exercising a limited jurisdiction beyond its term of origin.

Government counsel ask this Court to interpolate words necessary to make the order of February 28, 1940, conform to Section 421, Title 28, U. S. Code. They suggest that this Court should consider the testimony of one Brown before the grand jury in January 1940 concerning his activities in the operation of a currency exchange, (III. R.

614-692,) and the reported decision in a contempt proceeding wholly unrelated to this defendant, (116 Fed. (2nd) 455,) to get the right atmosphere, and then "in this setting" they say "the February 28 order must be interpreted." (Their brief, 29.) They suggest that the word "theretofore" should be inserted before the word "begun," that a comma should follow "begun," and that the sentence should be read as though the phrase "during the said December 1939 and said February 1940 Terms" modifies only the verb "finished." (Their brief, 31.) They do not suggest where this Honorable Court gets the authority to rewrite orders of district judges to give life to a grand jury otherwise dead. Furthermore, the order would not conform to the statute if it were rewritten as suggested. The only investigations which may be finished by a grand jury at a term succeeding its term of organization are investigations begun at its original term. If this Court should make the phrase in the order read "to finish investigations theretofore begun," the language would not limit the grand jury to investigations begun at the December 1939 Term. The "theretofore" would refer to the date of the petition, February 28, 1940, and would include the February 1940 Term.

Government counsel rather naïvely suggest (their brief, 31,) "* * * that there is doubt as to the meaning of the February 28 order as a result of its inartistic draftsmanship * * *." The lack of artistry in the order lies in its failure to conform to the statute. It is certainly not an inartistic expression of the District Judge's intention to authorize the grand jury to finish in the March Term investigations which it commenced in the February Term. The draftsman of the order could hardly have chosen language more appropriate to express that intention.

The only case cited by the Government in support of the order, which even approaches the point, is *United States* v.

Parker, 103 Fed. (2nd) 857. The order there considered is not set out in the opinion. The case involves a single continuance of the grand jury and there might be presumptions in support of a first order of continuance which the Court could not indulge in support of a second order of continuance. The statute specifically limits a continuance to a "term succeeding the term" at which the request for continuance is made, and provides that "no grand jury shall be permitted to sit in all more than three terms," and any general order of continuance would be void. A further limitation fixed by the statute on the order of continuance is that it shall be "solely to finish investigations begun but not finished by such grand jury." If the order in the *Parker* case is as general as the opinion indicates, then the decision emasculates the statute. We cannot believe that any court has approved an order under the statute which merely says that the grand jury is to "remain in service until the further order of the Court." There is no authority in the statute for any such order.

Government counsel make the amazing suggestion (their brief, 30) that the meaning of this order is not to be found by reading it, but by referring to the preamble of the indictment itself, particularly the clause, "* * * having begun but not finished during said December Term of court among other things an investigation of the matters charged in this indictment, and having continued to sit by order of this Court * * * during the February and March Terms of said Court for the purpose of finishing investigations begun but not finished during said December Term of Court * * *." This suggestion ignores the basic canon of construction of any document, namely, that if the document is written in clear and unambiguous language its plain meaning is in law its true meaning. Furthermore, a comparison of this recital in the indictment with the order of the District Judge shows that the grand jury requested something entirely different from what its recital in the indictment

says was granted. There would seem to be no more basis for arguing that the Judge's order meant what the recital in the indictment says it meant than that the recital in the indictment meant what the Judge's order said the grand jury requested. The order says the grand jury requested authority to continue to sit "to finish investigations begun but not finished by said grand jury during the said December 1939 and the said February 1940 Terms," whereas the recital in the indictment says that the grand jury "continued to sit * * * during the February and March Terms of said court for the purpose of finishing investigations begun but not finished during said December Term." Under the order the December Term grand jury was authorized to continue to sit at the March Term to finish investigations *begun* at the February Term, whereas under the recital in the indictment this grand jury continued to sit to finish investigations at the March Term which had been *finished* at the February Term. Certainly it is a proposition, the novelty of which does not exceed its absurdity, to suggest that a recital in an indictment as to what the legal consequence, effect and meaning of a judge's order is, is determinative of the real meaning of said order. Whatever weight might attach to a later statement of a district judge as to the meaning of an order entered previously by him, certainly no persuasive argument may be attributed to a statement of a grand jury as to what an order entered on its motion truly means.

It is sugges[illegible]hat the authorization to this grand jury to continue [illegible]estigations at a third term which it began at the second term is merely an excessive authorization and is a nullity, and that by expunging the void part of the order there remained the valid order to the grand jury permitting it to finish during the March Term the investigations which it had begun during the December Term and had not finished during the December or the succeeding February Term. Government counsel do not suggest what

words may be expunged. To support their argument there is the assertion without proof, that the indictment was in fact the product of investigations commenced during the December Term. (Their brief, 33.) Government counsel seem to overlook the fact that the Bill of Rights (Amendment V., U. S. Constitution) guarantees that no person shall be held to answer for an infamous crime except on an indictment by a grand jury, (*Ex parte Bain*, 121 U. S. 1, 13; *Renigar* v. *United States*, 172 Fed. 646, 654,) that a Federal grand jury is a creature of statute, (*In re Mills*, 135 U. S. 263, 267,) and that there can be no indictment unless the body returning it is a legal grand jury. (*Smith* v. *Texas*, 311 U. S. 128; *Norris* v. *Alabama*, 294 U. S. 587; *Crowley* v. *United States*, 194 U. S. 461, 474; *United States* v. *Gale*, 109 U. S. 65, 71; *Dunn* v. *United States*, 238 Fed. 508, 512; *United States* v. *Lewis*, 192 Fed. 633, 637; *United States* v. *Haskell*, 169 Fed. 449, 454.) There being no order conforming to the terms of the statute authorizing this grand jury to sit beyond the February 1940 Term, it ceased to exist with that term, and the act of this group of citizens, after they ceased to be a grand jury, in presenting a document purporting to be an indictment was a nullity.

Finally, it is argued that Section 556, Title 18, U. S. Code, warrants this Court in ignoring the invalidity of this order purporting to continue this grand jury. The very language of this statute shows that it has no application. It is designed to cure defects in the form of an indictment "presented by a grand jury." *In this case there is no grand jury and so there can be no indictment.* The challenge here goes to the very root of this prosecution. Notwithstanding the assault upon human rights in a great part of the world, we of the United States of America still believe that the fundamental and blood-bought principles written into our Bill of Rights are matters of substance and not mere form. It is no mere "technicality" to ignore the safeguards

of human liberty written into our statutes. *Bruno* v. *United States*, 308 U. S. 287, 294; *Edwards* v. *United States*, 312 U. S. 473, 482; *Renigar* v. *United States*, 172 Fed. 646, 655, 658.

It is always easy for the prosecutor to say that an accused was not prejudiced by an error committed, even where it goes to the denial of a constitutional safeguard. Such is the answer of the mob when it hangs a "guilty" man. We assert that William R. Johnson is not guilty of the offenses charged, but if he were, he is entitled to be accused by presentment by a grand jury as the Constitution provides. This right the District Court denied; and the Circuit Court of Appeals, by reversing the judgment of the District Court, merely applied the plain law of this country as established by the Constitution, the statutes and the decisions.

B. The December 1939 grand jury had no authority to return counts 4 and 5, which relate to events which did not occur until March 15, 1940.

Counts 4 and 5 are a complete refutation of the oft-repeated statement of Government counsel that no new investigations were in fact begun after the conclusion of the December 1939 Term.

The fourth count of the indictment charges a wilful attempt to evade income taxes for the year 1939. The return with respect to this year was not due until March 15, 1940, and was in fact filed on that date. The offense charged in the fourth count was committed, if at all, on March 15, 1940. (*Bowles* v. *United States*, 73 Fed. (2nd) 772, 775; *United States* v. *Miro*, 60 Fed. (2nd) 58, 61; *O'Brien* v. *United States*, 51 Fed. (2nd) 193, 196; *United States* v. *Mathis*, 28 Fed. Supp. 582, 584.) The investigation with respect to 1939 could not have been begun at the December 1939 Term which ended before February 3, 1940. The motion to quash specifically alleges that the

investigation of the subject matter of the fourth count was first begun at the March 1940 Term, (I. R. 30,) and in the nature of things the investigation with respect to this offense could not have been begun until March 15, 1940. The December grand jury could not anticipate that Johnson might fail to file a return or might file a false return six weeks after the December Term closed, and begin an investigation of an offense which might never occur or which investigation it obviously could not finish until the second succeeding term. This grand jury could not have returned an indictment at the December Term charging the offense alleged in the fourth count, not because of any complexity in the investigation but because the offense had not been committed. We submit that the reasoning of the Circuit Court of Appeals with respect to the invalidity of this count of the indictment (I. R. 185-186) is unanswerable.

The argument that the word "investigations," as used in Section 421, Title 28, U. S. Code, should be construed to include inquiry concerning offenses which may be committed in the future or which may never be committed, as well as offenses already committed, finds no support in law or logic. It is true that a grand jury has broad inquisitorial powers, and that while it has legal existence it may investigate any facts necessary to determine whether an offense has been committed, the precise nature of the offense, and the identity of the offender. No authority has been cited and we think none can be cited which supports the contention of the Government that the December 1939 grand jury could be continued to the February 1940 Term and again to the March 1940 Term to finish an investigation with respect to an offense which, at the December Term, it could only anticipate might be committed and which, in the nature of things, could not be committed until the occurrence of an event which, under the law, could not occur until the middle of the term of court second succeeding the

term at which the grand jury was impanelled. There is nothing said in the opinion of the Circuit Court of Appeals which will in any way impede the carrying out of the essential functions of the grand jury in making a thorough investigation of offenses already committed. Grand juries should not be permitted to waste time and money investigating offenses which some crystal-gazer thinks may be committed by someone some time in the future.

The fifth count of the indictment charges this defendant and others with conspiracy to defraud the United States by depriving it of the income taxes due from this defendant in the years 1936 to 1939 inclusive. As the Circuit Court of Appeals says (I. R. 186), the situation with reference to this count which charges a continuing offense is different from the situation with reference to the fourth count which charges an offense which is not continuing. We think, however, that the action of the District Court in denying the motion to quash, which alleged under oath that the matters charged in the fifth count of the indictment were first presented to the grand jury at the March 1940 Term and that the investigation of the matters alleged in this count was not begun by the grand jury at the December 1939 Term, without giving this defendant an opportunity to offer evidence in support of his allegations of fact, was error. There is no denial of the allegations respecting the time of the commencement of the investigation. This defendant, by his then attorney, asked for a rule on the Government to answer his motion to quash (I. R. 44) and this motion was denied. (I. R. 45.) If the Government controverted the facts pleaded, then this defendant should have been given opportunity to prove his allegations. *Edwards* v. *United States*, 312 U. S. 473, 482; *Carter* v. *Texas*, 177 U. S. 442, 447; *Nanfito* v. *United States*, 20 Fed. (2nd) 376, 378.

C. The December 1939 grand jury had no authority to return at the March 1940 Term the first, second and third counts of the indictment. It had finished its investigation with respect to the subject matter of these counts at the February 1940 Term and there was no authority under the statute to continue it to the March 1940 Term for further investigation as to such matters.

The Circuit Court of Appeals misapprehended our contention with respect to this ground of challenge to the validity of the first three counts of the indictment. We agree that an existing grand jury is not precluded from continuing an investigation after the return of an indictment and from subsequently indicting for the same offense, as the Circuit Court of Appeals holds, (I. R. 185,) but it is our contention that this grand jury ceased to exist at the end of the February Term with respect to the matters as to which its investigation had been completed. The statute says that a grand jury may be continued "solely to finish investigations begun but not finished by said grand jury." If it has finished its investigation then there is no authority to continue it. This body of citizens was not a grand jury at the March Term. The motion to quash alleges that the investigation of the matters covered by the first, second and third counts was finished and concluded at the February 1940 Term of court, (I. R. 30-31,) and the fact that the grand jury returned an indictment on March 1, 1940, a day of the February Term, charging this defendant with an attempt to evade income taxes for the years 1936, 1937 and 1938 is, under the circumstances, conclusive that it had finished its investigation with respect to the matters covered by these counts. We think no one will contend that if there had been no attempt to continue this grand jury to the March Term the indictment returned at the February Term would not have been a completed presentment by the grand jury.

D. The motion to quash alleges facts, not conclusions.

The argument of Government counsel that the verified motion to quash alleges no specific facts but only ultimate conclusions (their brief, 36-40) falls of its own weight. It is specifically alleged in the motion to quash that no investigation of the matters covered by counts 4 and 5 of the indictment was begun at the December 1939 Term of court and that the investigation of said matters was first begun at the March 1940 Term of court, and it is likewise specifically alleged that the investigation of the matters covered by counts 1, 2 and 3 was finished and concluded at the February 1940 Term of court. (I. R. 30-31.) It is difficult to conceive how there could be more specific and direct allegations of fact. The motion to quash challenges the jurisdiction of the Court. Under the Bill of Rights (Amendment V., U. S. Constitution) no person can be held to answer for an infamous crime unless on indictment by a grand jury, and under the statute (Sec. 421, Title 28, U. S. Code) the grand jury ceases to exist with the adjournment of the term at which it was impanelled, unless it is continued "solely to finish investigations begun but not finished by such grand jury." Obviously, no matter how much like a legal and proper grand jury any group of twenty-three men may act, unless they are in fact a legal grand jury they cannot return a legal indictment. Such a group does not have the power to create itself into a grand jury and its adherence to legal form cannot infuse it with legal life.

E. It must affirmatively appear from the record in a criminal case that every step necessary to the validity of the indictment has been taken before a valid sentence can be entered. There is no presumption that the December 1939 grand jury had authority to return an indictment at the March 1940 Term of court.

Government counsel lift out of the context of the opinion of the Circuit Court of Appeals the sentence, "We think failure to prove the allegation with reference to the authority of the grand jury to act is likewise fatal," and build a man of straw and then proceed to knock it down. (Their brief, 40-42.) When the entire discussion of the Circuit Court of Appeals is read it is clear that all it holds is that it must appear affirmatively from the record in a criminal case that an indictment was returned by a legal grand jury before a valid sentence can be entered. (I. R. 189-190.) This is the holding of the same court in *Skidmore* v. *United States*, 123 Fed. (2nd) 604, involving the same grand jury sitting at its second term. Where there is a direct challenge to the authority of a grand jury to act at a term succeeding its term of organization, the record must disclose facts from which it can be determined that the grand jury is a legal body acting within the limitations which Congress has definitely and plainly fixed. Government counsel seem to take the position that this defendant was not entitled to an opportunity to present evidence in support of the allegations of fact in his motion to quash showing absence of grounds for continuance, and that, having been denied a hearing at this preliminary stage, he does not put in issue by his plea of not guilty the allegation in the indictment that the grand jury was legally continued. As the Circuit Court of Appeals said, (I. R. 190,) "There may be room for contrariety of opinion as to the precise manner in which the authority of a grand jury should be challenged, but we doubt if any will contend that

the Government can wholly evade the challenge as has been done in the instant case." If the District Court had ordered the Government to answer the motion to quash and if it had been established by the evidence heard at this preliminary stage of the proceedings that the allegations of fact of the motion to quash were not true, and that the grand jury was acting legally at the March 1940 Term, then this question of failure of proof with reference to the allegations in the indictment would not have arisen.

We recognize the general rule that regularity of judicial proceedings is presumed and that it is not necessary to prove the foundation of the authority of the grand jury to return the indictment. We submit that this rule applies only where authority of the grand jury is exercised in the course of ordinary jurisdiction. Here we have a special situation with respect to the authority of the grand jury comparable to that which arises where action is by a special court. In such a case nothing is presumed in favor of jurisdiction. The authority to act in a particular matter must affirmatively appear from the record. *Galpin* v. *Page*, 85 U. S. 350, 366; *Miller* v. *United States*, 78 U. S. 268, 299.

It is obvious that the author of the indictment recognized that the indictment had to allege facts which showed authority of the December 1939 grand jury to return an indictment at the March 1940 Term of court. This could not be presumed. He knew that a grand jury is a statutory body and that it has no existence beyond the terms of the statutes under which it is organized or continued. If it was necessary to allege special facts showing the right of this grand jury to act at a term subsequent to the one at which it was summoned and organized, then it was necessary to prove these facts. Having evaded the issue before trial, the prosecution had to meet the issue at the trial. This defendant was entitled to a hearing on this issue at some stage of the proceeding. Having postponed the issue to the

trial, the same burden was on the Government to prove the facts peculiar to the right of this particular grand jury to act as to prove the fact of venue and other special matters going to the jurisdiction of the Court. The Circuit Court of Appeals has not departed from established practice and its decision does not raise obstacles which will impede the effective administration of the criminal law. It merely announces the elementary and fundamental proposition that a defendant is entitled to a hearing on any issue properly presented by his pleas.

The judgment of the Circuit Court of Appeals, reversing the conviction of this defendant, should be affirmed for the reasons assigned under this division of our brief.

II.

The demurrer should have been sustained. The allegations of the indictment are insufficient, uncertain, duplicitous and repugnant.

This defendant is entitled to support the judgment of the Circuit Court of Appeals reversing the conviction on any ground warranted by the record, though he may wish to show that the Circuit Court of Appeals might have based its judgment on different or additional grounds. *Ryerson* v. *United States*, 312 U. S. 405, 408; *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434; *Le Tulle* v. *Scofield*, 308 U. S. 415, 421; *Langnes* v. *Green*, 282 U. S. 531, 538; *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435.

We submit that the Circuit Court of Appeals was in error in overruling this defendant's contention that counts 1, 2, 3 and 5 of the indictment are void, even if the grand jury had legal existence. (I. R. 190-193.) Should this Honorable Court hold that the order continuing the grand jury

was in conformity with the statute, it should nevertheless sustain this defendant's demurrer (I. R. 137-139) and affirm the judgment of the Circuit Court of Appeals reversing this conviction.

It is alleged in the first count of the indictment that the December 1939 grand jury, "having begun but not finished during said December Term of court among other things an investigation of the matters charged in this indictment, and having continued to sit by order of this Court in and for said division and district during the February and March Terms of said court for the purpose of finishing investigations begun but not finished during said December Term of court," does present and charge at the March 1940 Term. There is lacking the essential jurisdictional allegation that the investigation begun at the December Term had not been finished at the February Term.

Under Section 421, Title 28, U. S. Code, a grand jury may be continued *solely* to *finish* investigations *begun* but *not finished* by such grand jury. If a grand jury has begun an investigation and has finished the investigation at the term for which it was summoned and organized, it cannot be continued to a succeeding term. And if a grand jury has begun an investigation at its original term and has not finished the investigation at that term and is continued to a succeeding term to finish its investigation and it does finish the investigation at such succeeding term, then it cannot be continued to a second succeeding term.

If the investigation in this case was finished at the February Term as to the matters charged in the indictment herein, or any of them, then there was no authority to continue the grand jury to the March Term as to such matters. We have already pointed out that this grand jury at the February Term returned an indictment of three counts identical with the first three counts of the present

indictment, and so it appears conclusively that the grand jury had finished its investigation at the February Term of the offenses alleged as to the years 1936, 1937 and 1938.

This challenge to the indictment goes to the jurisdiction of the District Court. There is no presumption that the December 1939 grand jury had authority to return an indictment at the March 1940 Term. The presumption is directly to the contrary. A Federal grand jury is a creature of statute and can have only the existence authorized by statute. (*In re Mills*, 135 U. S. 263, 267.) Except where continued as provided by law, a grand jury has no existence beyond the term for which it was impanelled. (*Jones* v. *United States*, 162 Fed. 417, 421; *Nealon* v. *People*, 39 Ill. App. 481, 483; *Evers* v. *State*, 179 Ark. 1123; *State* v. *Shawley*, 334 Mo. 352; *Walton* v. *State*, 147 Miss. 851.) The omission to allege in the indictment that this December grand jury had not finished its investigation at the February Term is fatal to the validity of the indictment because the grand jury had authority under appropriate orders of court to continue to sit at the March Term *solely* to *finish* investigations *begun* at the December Term and *not finished* at the December Term and the February Term. The allegation is that it had not finished at the *December* Term but there is no allegation that it did not finish at the *February* Term.

Counts 2, 3, 4 and 5 of the indictment make no allegations with respect to the organization or continuance of the December grand jury, either by reference to the first count or otherwise. This December grand jury had no authority to return these counts of the indictment at the March 1940 Term unless it had begun but not finished the investigation at the December Term and had been continued to the February Term to finish such investigation and had not finished such investigation at that term and had then been continued to the March Term. Each count of the

indictment must be sufficient in itself. Where any count fails to allege facts which show that the grand jury which returned it had a legal existence, when that grand jury without special authorization would have had no existence, that count is void. On this ground the last four counts are insufficient.

The offense of attempting to evade payment of income tax is committed on the day the return is filed or is due. (*Bowles* v. *United States*, 73 Fed. (2nd) 772, 775; *United States* v. *Mathis*, 28 Fed. Supp. 582, 584.) The first four counts of the indictment allege that the attempt was committed on March 15 in the years 1937, 1938, 1939 and 1940, respectively. There follow allegations in each of the counts which are repugnant to the allegation that the offense was committed on March 15. For instance, in the first count it is alleged that a false return was made on March 12, 1937, that it was filed on March 15, that a part of the tax was paid on March 15 and the balance of the tax thereafter, and that the tax thereafter paid was insufficient to pay the whole tax due. It is further alleged that the defendant concealed from the officers of the United States his income and the sources of his income and the books and records reflecting his income and the sources thereof, but no date is alleged for this charge of concealment. It appears from other allegations that the concealment continued throughout the year 1936 and up to March 15, 1937 and thereafter until the return of the indictment. What we have said with respect to the first count applies with changes of dates to the second, third, and fourth counts. If the offense charged against Johnson in these counts is not a single overt act committed on a day certain, then there is no statute of limitations which can apply, for as long as he does not pay the tax due under the law he is continuing his attempt to evade the payment of such tax. An attempt is not a continuing offense.

The first four counts of the indictment are duplicitous in that they each charge four distinct offenses,—to-wit, the offense covered by Section 145(b) which carries a maximum penalty of $10,000 fine and imprisonment for five years, and three offenses covered by Section 145(a) which carry a maximum penalty of $10,000 fine and imprisonment of one year. To illustrate: the first count charges specifically that Johnson wilfully attempted to defeat and evade a large part of the tax due upon his income for the year 1936 on March 15, 1937; and it also charges that Johnson failed to make a return as to a large part of his income for 1936, which return was due on or before March 15, 1937, that he failed to keep records and supply information required by law for the purposes of computation, assessment and collection of income tax, and that he failed to pay the tax due on March 15, 1937, or thereafter. It is true that it is alleged that the acts which constitute the offenses covered by Section 145(a) are alleged as means of committing the offense covered by Section 145(b), but if we should strike out of the indictment the allegations with respect to the offense of wilfully attempting to evade and defeat his tax and leave only the allegations with respect to any of the other offenses, the indictment, if otherwise sufficient, would be sufficient to charge such other offense, and upon conviction the defendant would be subject to the penalties prescribed by Section 145(a).

Duplicity is the joining in one count of two or more distinct offenses. Where separate offenses are sufficiently charged, none of them can be rejected as surplusage in order to support the charge as of another. There can be no aider by verdict where the offenses are subject to different punishment as in this case. *Creel* v. *United States*, 21 Fed. (2nd) 690, 691; *John Gund Brewing Co.* v. *United States*, 204 Fed. 17, 21.

We find no case where the point we make with respect to an indictment under this statute has been discussed in

the decision. We think *O'Brien* v. *United States*, 51 Fed. (2nd) 193, 196, supports our position because it is there squarely held that the offenses covered by paragraphs (a) and (b) of Section 145 are separate and distinct offenses. If they are, then it follows under the authorities that they cannot be joined in one count of an indictment. See also *United States* v. *Noveck*, 273 U. S. 202, 206.

The Circuit Court of Appeals held that the demurrer should have been sustained as to the fourth count, but it held that counts 1, 2, 3 and 5 were good as to this defendant. We submit that the demurrer should have been sustained as to all counts and that the judgment of the Circuit Court of Appeals should be affirmed on the grounds argued under this division of our brief.

III.

The evidence did not establish the guilt of defendant Johnson under any count of the indictment and a verdict of not guilty should have been directed.

There is no direct evidence in this case that William R. Johnson has failed to return taxable income for any year. The direct evidence is that he has returned all taxable income for the past twenty years, and particularly for the years 1936, 1937, 1938 and 1939 covered by the indictment, and that he has paid all income taxes due the Federal Government. The case for the prosecution rests on circumstantial evidence alone and it is by mere conjecture that this defendant is made the owner of a string of gambling houses and charged with an income from the operation of these houses.

We need not remind this Court that the burden is on the prosecution under the first four counts to prove beyond a reasonable doubt that defendant Johnson had a taxable

income over the amount returned for each of the years involved, and that the mere fact that he had transactions involving large sums of money would not prove that all the money handled in any particular year was taxable income for that year. Johnson could not be guilty of attempting to evade a tax unless some tax was due. (*Gleckman* v. *United States*, 80 Fed. (2nd) 394, 399; *O'Brien* v. *United States*, 51 Fed. (2nd) 193, 196.) Johnson was not required to prove that he had paid all taxes due from him. The burden of proof in a criminal case never shifts to the defendant. (*Chaffee & Co.* v. *United States*, 18 Wall. 516, 545; *McKnight* v. *United States*, 115 Fed. 972, 974; *Melton* v. *United States*, 120 Fed. 504; *Minner* v. *United States*, 57 Fed. (2nd) 506, 512.) These sound principles of law are well established and have been applied by this Court.

It is also settled law that unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused. (*Paddock* v. *United States*, 79 Fed. (2nd) 872, 876; *Nicola* v. *United States*, 72 Fed. (2nd) 780, 786; *McClintock* v. *United States*, 60 Fed. (2nd) 839, 842; *Dickerson* v. *United States*, 18 Fed. (2nd) 887, 893; *Grantello* v. *United States*, 3 Fed. (2nd) 117, 118,) and that where the evidence for the prosecution is as consistent with innocence as with guilt, a judgment of conviction will not be sustained by a reviewing court. (*Gargotta* v. *United States*, 77 Fed. (2nd) 977, 984; *Dahly* v. *United States*, 50 Fed. (2nd) 37, 43; *Vinciquerra* v. *United States*, 21 Fed. (2nd) 508, 510; *Bishop* v. *United States*, 16 Fed. (2nd) 410, 417; *Harrison* v. *United States*, 200 Fed. 662, 664.) The law requires that there be more than some evidence of guilt. (*Towbin* v. *United States*, 93 Fed. (2nd) 861, 866.) The proof must be of that substantial character which leaves an abiding conviction that the accused is guilty of the offense charged.

Applying these rules, fundamental in the administration of criminal justice under the American system, let us examine the evidence in this case as to each count separately.

As to Count 1—Year 1936.

We assert with confidence that there is no evidence which supports the charge that defendant Johnson wilfully attempted to evade the payment of income taxes for the year 1936, either on the theory that he owned a group of gambling houses and derived income therefrom, or on the theory that he expended in 1936 more cash than he had available according to his returns for that year and prior years. Johnson reported a taxable income of $173,220.40 in 1936 and the Government failed to sustain its burden of proving that he had a greater income.

At the outset of our discussion of the evidence, we direct attention to the fact that the financial transactions of the gambling house operators with the currency exchanges consisted merely of cashing checks and exchanging currency. These institutions accept no deposits. They keep a record of the checks cashed only for the purpose of getting reimbursement from the patron if a check is not paid by the maker. (II. R. 494, 533.) They keep no record of currency exchanged. These gambling house operators use bills for making bets at the gambling tables and they wear them out. (III. R. 792.) When this worn currency is exchanged for new, the operator has the same amount of money. (II. R. 491, III. R. 816.) The Court will see, as the evidence is analyzed, that there is no proof in this record of the amount actually involved in these transactions.

The evidence as to each gambling house involved must be considered separately. Proof that Johnson owned in whole or in part a gambling house operated by Flanagan, if there were any such proof, would not be proof that he

owned or was interested in gambling houses operated by Sommers or Kelly or Hartigan or any other person.

The only evidence which could have any bearing on Johnson's ownership of gambling houses during the year 1936 would be that testimony which related to conversations, acts or transactions of Johnson during that year or years prior thereto. Conversations and acts of co-defendants, outside the presence of Johnson and with which Johnson was in no way connected by proof, are hearsay as to Johnson and cannot be considered under the first count of the indictment.

The evidence shows that Flanagan operated a gambling house alternately at 4020 West Ogden Avenue and at 2141 South Crawford (now Pulaski), and a service bureau first located at 2135 South Crawford (now Pulaski) and later at Irving Park and Milwaukee. (III. R. 931-932.) We ask in all sincerity, what evidence is there which shows that Johnson had any interest in these establishments in 1936? The fact that Johnson owned the buildings where Flanagan's gambling house was operated, and leased these buildings to and collected rent from Flanagan, (III. R. 932, 950,) which rent he returned as income, (see returns,) is not proof that Johnson owned the gambling houses; it is proof to the contrary. Certainly Hayes' testimony (II. R. 294), denied by Johnson (III. R. 953) and Flanagan (III. R. 938), that Johnson spoke excitedly to Flanagan concerning a robbery occurring at the 4020 Club in 1933 does not tend to prove that Johnson owned the gambling house operated at that address in 1936. The testimony of Lenz (II. R. 151), denied by Johnson (III. R. 951) and Flanagan (III. R. 937), regarding a conversation between him and Johnson and Flanagan at the 4020 Club in 1935 regarding a dispute between Lenz and Flanagan over the service charge for the racing news service, assuming it is true, is not that substantial evidence of ownership of the gambling

house operated in Johnson's premises which the law requires in a criminal case. This testimony is as consistent with the direct testimony of Johnson and Flanagan that Johnson had no financial interest in the rate, but was interested only in his tenant, as it is with the unsupported theory of the prosecution that Johnson was the proprietor of the gambling house receiving the service. The income tax returns of Flanagan prepared by Brantman prior to 1936 (II. R. 425, 445) and by Radomski in 1936 (II. R. 107) were hearsay as to Johnson; but, if they are held to be admissible against him, they do not even tend to prove that Flanagan was an employee of Johnson or that Johnson had any interest in Flanagan's establishment. Leaving grounds of incompetency out of consideration, under this evidence can it be seriously contended that the total of the currency exchanged and checks cashed at the Lawndale Currency Exchange by Flanagan and his employee Couch should be charged to Johnson as income in 1936? Except rent paid, *not a dollar of Flanagan money was traced to Johnson.* We think it clear, under the most elementary rules, that there is a complete absence of evidence necessary to support a deduction that the income from Flanagan's house was Johnson's income, even if it were proved that there was an income from the house, taxable to anyone.

The evidence shows that Kelly operated the D. & D. Club in the Lincoln Park Building at Dearborn and Division. (II. R. 458, 878.) The fact that Kelly rented space in this building owned by Johnson (III. R. 950), through the rental agent Tavalin (II. R. 14), and paid rent for his space while he operated there (II. R. 16) is proof that Johnson did not own the gambling establishment of Kelly rather than that he did. Kelly rented the space in 1936 and employed workmen to make the necessary alterations. (III. R. 878, 885.) There is no proof that Johnson had any connection with the D. & D. Club in 1936 or that he

received any income from the club other than the rent paid. The renting was handled through Tavalin exactly the same with respect to Kelly as with respect to other tenants in the building, (II. R. 14, 23,) and all the rent receipts were reported by Johnson in his return for 1936. Gov. Ex. R-10, III. R. 950.

The evidence shows that Sommers operated the Horse-Shoe Club at 4721 North Kedzie and the Dev-Lin Club at Devon and Lincoln. He acquired these establishments from former owners in 1934 and 1935, respectively. (III. R. 782, 784, 810, 812, 896.) There is much more testimony directed at Johnson's connection with Sommers' establishments than with the others, but an examination will show that this evidence does not prove that Johnson had an interest in the Sommers' gambling houses, much less that he was the sole owner of them. Brantman, who had been preparing income tax returns for Johnson since 1925, testified that in 1932 he told Johnson that the Government was making a drive for returns from persons making gains from illegal pursuits and that at Johnson's request he later reported this to Sommers. (II. R. 421-423, 429.) Brantman qualified these statements materially on cross-examination and admitted he might be mistaken about the time and substance of conversations. (II. R. 435-436, 438-440.) These conversations occurred, if at all, three or four years prior to 1936 and at least a year or two prior to the time Sommers became the proprietor of the Horse-Shoe and the Dev-Lin. Barnes was operating the Horse-Shoe until his death in 1934. (III. R. 782.) The fact that Johnson and Sommers both switched to Radomski for accountant's service in the preparation of their returns for 1936 is a coincidence which proves nothing. The stories of Cobb (II. R. 351), Didier (II. R. 225) and Singer (II. R. 396) that Johnson put them to work or helped them get work with Sommers are uncertain as to detail, as is natural because of lapse of time. Johnson admitted that he helped hundreds of men get jobs during the period of

widespread unemployment but denied he hired any of them or ordered them hired. (III. R. 952.) Neither the workmen who made repairs at the Sommers establishments nor the men who furnished bus, transfer and storage service to Sommers testified that Johnson had anything to do with their employment. The Government relies on inferences from this sort of proof to show that the total of the currency exchanged and checks cashed by Sommers in 1936 at the Northern Trust Company and the Albany Park Currency Exchange, involving turn-overs aggregating about a half million dollars, represented income of defendant Johnson. None of the employees of the Northern Trust Company or of the Albany Park Currency Exchange, who dealt with Sommers, testified that they had any dealings with Johnson or that he had any connection with any of the transactions.

The evidence does not even establish facts from which the inference of Johnson ownership can be drawn, much less the many facts necessary to warrant the conclusion that the aggregate of Sommers' transactions represented income of defendant Johnson. The proof does not even establish that the checks cashed or currency exchanged represented income of anyone. The theory of the prosecution seemed to be that these transactions were too large for a little fellow like Sommers, therefore Sommers must be working for some big operator like Johnson, and that the transactions were those of this unidentified operator and that they represented profits to him. This is piling inference on inference and hopping from assumption to assumption with wild abandon. *That any of this money handled by Sommers ever reached Johnson is pure conjecture.* There is no evidence on which to rest the conclusion of Agent Clifford that this $500,000, which may have been one $10,000 bankroll turned over 50 times during the year, should be included in Johnson's income for 1936. On this evidence alone Clifford included the aggregate of all of Sommers' transactions in 1936 as income received by Johnson. (III.

R. 751.) This accounts for about $500,000 of income which the prosecution says Johnson failed to report in 1936.

The evidence shows that Hartigan operated the gambling room at the Lincoln Tavern during the winter of 1935-1936 and opened the gambling establishment at Harlem Stables in the summer of 1936. (II. R. 492; III. R. 804, 806, 896.) There is no proof that there was any income from these gambling establishments in 1936, except the testimony of Marcus of Albany Park Currency Exchange that some of the checks cashed by one Downey bore the initials "L.T.," which he understood meant "Lincoln Tavern," (II. R. 477, 479,) and a few checks were marked "H.S.," which he presumed meant "Harlem Stables." (II. R. 487.) There is no proof of the amount of these checks in 1936 or that these checks represented income of anyone or that they were checks given by gamblers. There is no proof that Johnson had any knowledge of the existence of the checks or of the cashing of the checks or that he ever received any part of the proceeds of the checks. The evidence on which the Government relies to establish Johnson's connection with Hartigan's establishments consists of a few casual conversations between Johnson and others and a few visits made by Johnson to Hartigan's places, and occurrences at Harlem Stables in August, 1936. The only testimony tending to connect Johnson with Lincoln Tavern was that of Schultz that he saw Johnson looking over construction work in 1936 (II. R. 237) and of Atlas that Johnson asked him to install a bookkeeping system at Lincoln Tavern. (II. R. 305.) Johnson denied the Atlas conversation (III. R. 953) and Wait said that no one was interested with him in the Lincoln Tavern restaurant. (III. R. 896.) Certainly the testimony of Cobb that Hartigan told him in 1936 not to say that he was working for Johnson (II. R. 356) was pure hearsay. If competent, it did not prove that he was working for Johnson; it tended to prove the contrary. The only testimony tending to show that Johnson had an inter-

est in Harlem Stables relates to a series of events in August 1936 involving a controversy with Glenn and Russell Glave who claimed that they were the owners of the property prior to its being taken over by Hartigan and that they were entitled to the money that had been paid Earl Jackson as the purchase price. (II. R. 283, 290, 472, 475.) Assuming, contrary to the fact, the truth of the testimony of the Glaves that Johnson furnished the $600 which was paid in settlement of the various claims, this testimony is as consistent with the theory of the defense that the settlements were made on behalf of Hartigan at Hartigan's expense as with that of the prosecution that Johnson was settling on his own behalf. This testimony does not prove that Johnson was the owner of Harlem Stables or even that he was financially interested in it. All of the direct evidence on the subject is that Hartigan leased the premises and paid the rent and that he was home ill on the day the settlement was made with the Glaves and their former employees, and that the money paid in these settlements was Hartigan's money. (III. R. 804, 805, 813, 953, 971.) If we assume that this does tend to show that Johnson had some interest in Harlem Stables, it does not prove that he owned it or that he had any income from the place in 1936.

The evidence shows that Creighton owned the Club Southland and a group of other gambling houses on the south side of Chicago and in suburbs. (III. R. 850-858.) There was no proof of any character that Johnson owned Creighton's gambling houses or that he was financially interested in them or that he received any income from them in 1936. *No Creighton money was traced to Johnson*, but the Government included in Johnson's income for that year the aggregate of checks cashed and deposits made by Creighton at the Mid-City National Bank in 1936. Even the jury rejected the baseless deduction that Creighton was a stooge of Johnson and acquitted Creighton.

There is no evidence worthy of credit that these gambling houses were operated as a unit, but if the evidence received for this purpose were accepted at face value, it would establish, not that Johnson was the sole owner, but that the co-defendants, or some of them, were partners in the operation of the group of houses, or some of them, or had some working arrangement under which they cooperated in the promotion of their respective businesses. The fact that employees worked first for one and then for another as business required, that one proprietor took his customers to an open house when his house was closed, and that these gambling house proprietors used one group of skilled workmen to make repairs and one transferman, one storage house and one bus company, does not even tend to prove the charges in this indictment. As the Circuit Court of Appeals pointed out, these facts prove merely that these men, engaged in the same business, followed generally a common pattern and that if the facts tended to prove any crime, it was a conspiracy to violate the laws of the State prohibiting the operation of gambling houses. We think the Circuit Court of Appeals was clearly right when it said that the verdict of the jury cannot be supported on the theory that Johnson was the sole owner of this string of gambling houses and that he received income therefrom in the amount of the financial transactions of the operators of these gambling houses. (I. R. 195.) Under the first theory of the prosecution there was no evidence to support the first count.

Now let us look at the proof of expenditures. Taking into consideration only the record as made by Johnson's income tax returns and assuming the accuracy of the testimony of Agent Wilson that Johnson told him that he had $78,000 in cash available at the beginning of 1932, Johnson had available for expenditure during 1936 a total of $356,252.94. Taking the Government's testimony regarding expenditures prior to and in 1936, Johnson had left at the

end of the year cash in the amount of $281,432.47. Thus the indirect method of proving income by expenditures falls flat as far as 1936 is concerned.

Agent Clifford, who summarized the evidence for the Government, admitted the first count was not proved except on the assumption that Johnson owned the gambling houses and that all checks cashed and currency exchanged by the operators represented income of Johnson. (III. R. 759.) We have shown that this assumption is pure conjecture.

The Circuit Court of Appeals was right in holding that the motion for a directed verdict as to the first count of the indictment should have been sustained and in reversing the conviction for this reason. There is no competent evidence which shows any income tax due from Johnson for 1936. He paid $78,550.70 for this year.

As to Count 2—Year 1937.

We assert that there is no evidence to support the claim of the prosecution that defendant Johnson was interested in, much less the sole owner of, a string of gambling houses in 1937 and that income derived from these houses was income of Johnson. Johnson reported income of $264,015.13 in 1937 and the Government did not prove on any theory that he had income in excess of this amount.

As to Flanagan's and Creighton's places, there was no testimony of conversations or acts or transactions of Johnson in 1937. As to Kelly's place, there is the testimony of Grushkin relative to the installation of air-conditioning at the D. & D. Club, (II. R. 39-45,) and the testimony of Tavalin that Kelly's back rent amounting to $1,800 was settled for $100. (II. R. 17, 27.) These transactions relating to Johnson's building operations as a landlord do not prove that Johnson was the owner of the D. & D.

Club, one of the tenants; but they tend to prove the contrary. As to Sommers' places, Lebbin testified that Johnson spoke to Sommers about giving Lebbin employment at the Horse-Shoe, (II. R. 322,) and Pollack testified that Johnson offered to return money lost by him when a stick man called crocked dice at the Dev-Lin. (II. R. 379-380.) This proves nothing material to the issues. Bissel's testimony that Sommers telephoned the boss about making him a loan and that Sommers told him the boss was Johnson (III. R. 545-546) is rank hearsay as to Johnson. As far as Hartigan's places are concerned the only testimony regarding 1937 transactions is that of Cobb, who said he was employed at the Lincoln Tavern after talking with Johnson. (II. R. 352.) He did not say Johnson hired him. Thus, we find no evidence worthy of credit even tending to prove that Johnson owned this string of gambling houses in 1937, nor even that he was financially interested in them. *There was not a syllable of proof that Johnson received any income from these houses.* All the proof was that he received no income from them.

Notwithstanding this absence of evidence, the Government included in Johnson's income for 1937 more than $600,000 in proceeds from checks cashed by Sommers and Downey at Albany Park Currency Exchange, proceeds in excess of $200,000 from checks cashed at the Mid-City National Bank by Creighton, and currency (dealing money) exchanged by Sommers and Creighton in excess of $50,000. There is no proof that these transactions represented profits of anyone and certainly not profits of defendant Johnson. For all that the evidence shows, these transactions may have been merely weekly turnovers of these gamblers' bankrolls. The direct testimony of the employees of these banks and exchanges was to the effect that their dealings were exclusively with Sommers and Creighton respectively and their respective employees. (II. R. 476-493, 503-508, 515-519, III. R. 604-605.) Sommers and

Creighton testified that Johnson had no interest in the transactions and received none of the proceeds. (III. R. 820, 861.) Let it be remembered that Creighton was acquitted.

By pure conjecture and without even the basis for an inference, Clifford, the conjurer, picked out of the air the figure of $1,047,129.77 as Johnson's income in 1937. III. R. 743.

On the expenditure theory the Government did not establish a case for 1937. If the testimony of William Goldstein, a thoroughly discredited witness, is accepted at full face value, and all of the assumptions and deductions therefrom which the Government makes are accepted, then Johnson spent in 1937 $465,840.64. (III. R. 764.) Accepting the Government's calculations of Johnson's available cash in 1937, he had $501,660.61. (III. R. 762-763.) As the prosecution figures, there was a surplus of $35,819.97. Clifford admitted on cross-examination that the only way he could make a case on expenditures for 1937 was to assume Johnson had spent more than $5,000 a year since 1932 for living expenses and that he had no other resources than cash income. (III. R. 759-760.) There is a total failure of proof of Johnson's resources in 1937. The Circuit Court of Appeals was misled by an unsupported statement in the prosecutors' brief when it says (I. R. 195) that the proof shows that in 1937 Johnson's expenditures exceeded cash available as shown by his returns. There is no such proof.

In arriving at the amount of cash available to Johnson in 1937, Clifford assumes that Johnson started out at the beginning of 1931 without a dollar in cash and that the only money he had at the beginning of 1932 was $68,000. (III. R. 745.) This assumption is based entirely on the testimony of Agent Wilson that Johnson told him in January 1934 that on December 31, 1931, he had his bankroll of $10,000 and $68,000 in accumulated gambling profits in his

safety deposit box. (II. R. 10.) Even Wilson did not say that Johnson stated that he had no other assets. Johnson testified that during the course of a conversation with Agent Wilson sometime in 1934 relating to Johnson's 1931 return, there was a discussion of an item of $78,000 which appeared on his return as income from gambling, and that in response to a question from Wilson as to what he had done with this money he told him that he had about $10,000 of it in his bankroll and that he put the remainder of it in his box. He said that he did not tell Wilson that he had only $78,000 on December 31, 1931. (III. R. 960.) We respectfully submit that there is no conflict in the version of this interview as stated by Wilson and as stated by Johnson. Certainly there is reasonable explanation in honest misunderstanding or faulty recollection of Wilson, of the apparent difference in the versions of the interview. Johnson is abundantly corroborated in his testimony that he must have had between $140,000 and $150,000 in his box in addition to the $68,000 he put in it in 1931. The Government proved that he paid in 1932 a tax of $7,576.64, (II. R. 6,) which would be for his income in 1931. This would indicate that he reported in 1931 a gross income of about $80,000. After the audit of his 1931 return in 1934 he paid an additional tax of $9,738.90, plus interest and other charges, (II. R. 8, 444) on the claim that he had an income in 1931 of some $40,000 which he neglected to report. Thus it appears, according to the Government's figures, that in 1931 he had an income of about $120,000. In addition to this income the Government proved, on the cross-examination of Wait, that Johnson invested in Lawndale Kennel Club $100,000 in 1927 and that Johnson got his money back by an arrangement with the Hawthorne Club prior to 1931. (III. R. 903-904.) These two items alone confirm Johnson's testimony that he had on hand in cash at the beginning of 1932 some $220,000. (III. R. 960.) This last bit of evidence was not in the record when Clifford testi-

fied but we present it here because of its bearing on the verdict on this count.

In arriving at the total of expenditures made by Johnson in 1937, Clifford ignores (III. R. 746) the admissions of Goldstein on cross-examination that Johnson had only a half interest in 9730 South Western Avenue, (II. R. 64,) and ignores (III. R. 746) the testimony of Nadherny that Skidmore and not Johnson paid the $22,400 for the construction of the building on this property. (II. R. 79.) He also accepts the estimate of Tavalin as to the amount paid by Johnson for the equity in the Lincoln Park Building and charges him with payment of the full amount of the outstanding second mortgage notes on that property, (III. R. 748,) and ignores Tavalin's admission that he was depending on recollection and did not know the amounts paid but knew there was some discount. (II. R. 12-13, 25, 31.) In summing up the evidence on expenditures Clifford accepted only the evidence which suited his purposes and rejected all other evidence then in the record.

We respectfully submit that all the evidence fairly considered establishes that Johnson's expenditures in 1937, including an allowance of $10,000 for living expenses, were $396,625.76, (Facts, *supra*, pp. 21-23, 33,) and that his available cash was $641,183.81 and that he had at the end of the year an excess of cash available over expenditures of $244,558.05. Facts, *supra*, pp. 30-33.

A verdict of not guilty should have been directed as to the second count of the indictment. There was no competent evidence to support the conclusion that Johnson owed a tax for 1937. He paid $128,399.72 for this year.

As to Count 3—Year 1938.

Johnson reported an income of $120,975.15 for 1938. We submit that there is no competent evidence in the rec-

ord to support a finding that he had a greater income for this year.

The only new testimony tending to connect Johnson with Flanagan's establishments was the statement of Lenz, made under pressure of cross-examination by the Court and the prosecuting attorney, that Johnson called at the offices of Nationwide News Service to discuss the rates that were being charged Flanagan's service bureau. (II. R. 154, 157.) On cross-examination by the defendant's lawyer, Lenz was very uncertain about the time of the discussion and who was present and what was said, and he finally stated that Johnson was not present at the discussion. (II. R. 164.) This visit to the Nationwide offices was denied by Johnson (III. R. 951,) and Flanagan, (III. R. 937-938,) but, assuming that it was true, it does not prove that Johnson owned the service bureau and does not even tend to prove that Johnson owned the gambling houses subscribing to its service or received an income from them. As to the D. & D. Club, Tavalin testified that Johnson waived some more of Kelly's back rent, (II. R. 17, 23,) but he also testified Johnson did the same thing with respect to many other tenants. (II. R. 27-28.) Weeks testified that he got a job at the D. & D. Club after talking with Johnson, but he made it clear that Kelly employed him and directed his work. (II. R. 276-278.) These circumstances are as consistent with Johnson's innocence as with his guilt; in fact, they support the theory of the defense. The only additional testimony with respect to Sommers' establishments relating to Johnson's connection with them in 1938 was the testimony of Schumacker that Johnson told Sommers to put him to work, (II. R. 178,) the testimony of Kehoe that he was given $10 a week at the Dev-Lin at Johnson's direction, (II. R. 310,) the testimony of Didier that he was employed at the Horse-Shoe on the recommendation of Johnson, (II. R. 226,) and the testimony of Rebman that she talked with

Johnson about the limit on Red and Black at the Horse-Shoe, and that Johnson told her he would talk to Sommers about it. (III. R. 567.) All this testimony was denied by Johnson (III. R. 952-955) and Sommers (III. R. 813-814, 818); but, assuming the testimony to be true, it does not prove that Johnson owned the Horse-Shoe or the Dev-Lin and certainly does not even tend to prove that Johnson received any income from these places in 1938 which he did not return. There was no new testimony relating to 1938 which showed that Johnson had any connection with the Creighton and Hartigan places.

Government counsel says that "a manager of the Nation-wide News Service testified that Johnson * * * stated that his rates should be lower than rates charged other bookmakers because customers were drawn into his places by other gambling games." (Their brief, 7.) The reference (II. R. 157) is to an impeaching question read from a statement made by the witness to a government agent. This evidence is not proof that Johnson made the statement to the witness, but is proof merely that the witness made the statement to the agent. This statement offered by the Government, (and we submit improperly received,) to impeach its own witness cannot be considered as an admission of Johnson. *Southern Railway* v. *Gray*, 241 U.S. 333, 337; *Purdy* v. *People*, 140 Ill. 46, 52.

On this flimsy foundation the Government erected an income of nearly a $1,000,000 for Johnson for 1938. *There was no proof that a dollar of this money came into Johnson's hands.* It was assumed, without proof, that proceeds amounting to about $375,000 from checks cashed by Sommers and others at the Albany Park Currency Exchange, and nearly $200,000 from checks cashed by Sommers and others at the Lawrence Avenue Currency Exchange, and about $140,000 from checks cashed by Creighton at the Mid-City National Bank, and that cur-

rency (dealing money) exchanged by these gamblers in the amount of $250,000, were taxable income from gambling establishments and that an income of $935,353.80, as stated by Clifford, (III. R. 744,) was received by Johnson. The jury, by its acquittal of Creighton, found in effect that Johnson did not get the quarter million dollars handled by Creighton. This record does not reveal what income the jury found Johnson received in 1938.

The result for 1938, as for other years, arises from the assumption that Johnson was the sole owner of these gambling houses, added to the assumption that there was an income from these gambling houses, added to the assumption that the aggregate of checks cashed and currency exchanged represented profits of these gambling houses, added to the assumption that this total amount was paid to Johnson, added to the assumption that all of this money represented taxable income of Johnson. If this piling of assumption on assumption is not within the condemnation of *United States* v. *Ross*, 92 U. S. 281, 284, *Mackett* v. *United States*, 90 Fed. (2nd) 462, 464, *Symonette* v. *United States*, 47 Fed. (2nd) 686, 688, and other cases, then we do not read the cases aright.

On the theory that Johnson owned these gambling houses and received income from them in 1938, which he did not report, there is a total failure of proof.

Coming to the expenditure theory for 1938 we find the Government discarding its theory that Johnson had an income of $547,942.38 in 1936 and of $1,047,129.77 in 1937. Instead of the gambling house proprietorship theory and the expenditure theory complementing each other, they destroy each other. If Johnson had a million-dollar income in 1937, as the Government contends under its gambling house proprietorship theory, then he had abundant funds to meet the expenditures which the Government claims he made in 1938. The Government entirely

ignores the annual periods fixed by the Internal Revenue Act for reporting of income and it seeks to lump together the whole eight-year period covered by the returns received in evidence. The Government starts with January 1, 1932, as its base, and then, without recognizing the annual stops which the law provides, it undertakes to prove that Johnson's expenditures during the eight-year period aggregate more than the amount Johnson returned as income for the eight-year period. Its argument comes to this: In some year or years during the period Johnson did not report all of his taxable income. Taking the year 1938, there is no proof in this record that Johnson spent more money in that year than he had available for expenditure. If the Government's contention that Johnson had an income in 1937 of $1,047,129.77 is true, and if its contention that Johnson spent $465,840.64 is conceded, then, according to the Government's own figures, Johnson had an excess of income over expenditures in 1937 of more than $500,000. If Johnson started the year 1938 with this excess of $500,000, then, with his income reported for 1938 of $120,975.15, he had far more cash than was necessary to meet his alleged expenditures of $553,561.32 in 1938. There was a total failure of proof on the expenditure theory for this year. A conviction for failure to report taxable income for any particular year cannot be sustained from evidence showing expenditures in that year in excess of the amount reported, without proof that the taxpayer was without other resources.

Agent Clifford, in summing up for the Government, starts from nowhere but arrives at his result of excess expenditures over available cash in 1938 by assuming that all of the money spent at the Bon-Air Country Club was spent by Johnson. As we have shown, even if this were the fact, the charges would not be proven, but we show the evidence does not even warrant the assumption. There was no direct proof that Johnson furnished *all* the money

disbursed at Bon-Air. The prosecution was forced to rely on an assumption arising from the fact that Goldstein recorded a deed showing title to the real estate in Johnson and that the operating company's accounts carried credits for disbursements in Johnson's name. The direct evidence showed that Skidmore was interested in the Bon-Air Country Club, that he furnished some of the money to pay for improvements and that he controlled other expenditures, (II. R. 81, 172; III. R. 893-894, 896-898, 914, 916-917, 919-920, 922, 923, 925, 928, 930,) all of which corroborated Johnson's testimony that Skidmore owned half of the property and advanced half of the money spent. (III. R. 956.) Further proof that Goldstein's testimony that Johnson was his only "client" in the purchase of Bon-Air was false is his letter to the seller in which he said that he had "clients" (note the plural) who were interested in purchasing, (Def. Ex. J-6, III. R. 575,) and his statement to the seller's agent that he had to talk to a "couple of other people" before he could close the deal. (III. R. 576.) Co-defendant Wait, the president of the operating company and the representative of the owners who disbursed most of the money in 1938, testified that the money was furnished to him by Johnson and Skidmore in equal amounts. (III. R. 897.) Wait was acquitted by the jury.

A verdict of not guilty should have been directed as to the third count of the indictment. There was no competent evidence to support the conclusion that Johnson owed a tax for 1938.

As to Count 4—Year 1939.

Johnson reported a net income of $268,885.98 for 1939 and the Government failed in its attempt to prove that he had taxable income which he did not report.

There is no new proof of ownership from Johnson's conversations, acts or transactions in 1939 which is worthy of characterization as evidence. As to the D. & D. Club there is proof that his agent waived some more of Kelly's back rent, which is the course followed as to other tenants who could not pay. (II. R. 17, 27.) As to the Horse-Shoe, there was the testimony of Lang and Wolfson that Johnson helped them get jobs with Sommers, (II. R. 319, 387,) but no proof that Johnson employed them. There was nothing new to connect Johnson with the establishments of Creighton, Hartigan and other co-defendants.

For this year Clifford, in summing up for the Government, relies almost entirely upon his conclusion, without proof, that the Lawrence Avenue Currency Exchange was an agency established by Johnson to service the gambling houses and that all gambling house transactions with this exchange represented income of Johnson. (III. R. 754.) The testimony of Bagshaw that Brown referred to the Reserve for Uncollected Funds account on the books of the exchange as the "Johnson account" (II. R. 536, 537) was hearsay. If the reference was to defendant Johnson it fell far short of proving that the account belonged to defendant Johnson, if it had been competent for any purpose. Bagshaw admitted that he did not know and had never seen defendant Johnson before the trial (II. R. 540) and that no first name was used by Brown in referring to this account (II. R. 542) and that he had no knowledge that defendant Johnson was connected with the exchange or the account. (II. R. 543-544.) Assuming any credit can be given to the testimony of Brandt and Koop that they saw Johnson in the exchange a couple of times, (III. R. 591, 603,) what does it prove? They saw hundreds of people in the exchange and there is just as much basis for the assumption that any patron of the exchange was its owner as there is that Johnson was the owner. All the

direct evidence,—Johnson's testimony (III. R. 952), and Brown's testimony before the grand jury which was read into the record by the Government (III. R. 674-675),—shows that Johnson had no interest in or connection with the Lawrence Avenue Currency Exchange. The prosecution is bound by Brown's testimony. *Young* v. *United States*, 97 Fed. (2nd) 200, 202; *State* v. *Darrah*, 60 Idaho 479; *State* v. *Hernandez*, 36 N. Mex. 35; *Spicer* v. *State*, 113 Tex. Cr. App. 616.

Notwithstanding this state of the record, the sum total of the proceeds of checks cashed and currency exchanged by co-defendant Sommers and others at the Lawrence Avenue Currency Exchange in 1939, aggregating, as Clifford figured, (III. R. 754,) $886,499.30, was called Johnson's income. There were also included in Johnson's income $40,000, representing the total in worn bills exchanged over an eight-month period for new working money by Sommers, and $40,000, representing proceeds from checks cashed by Creighton at another exchange over a period of several months. (III. R. 754.) There was no proof of the *amount* of money actually involved in these transactions, and no proof that any of it was profit to anyone. Without proof of the steps necessary to arrive at the conclusion that Johnson had an income of nearly $1,000,000 in 1939, the Government assumed that he owned the gambling houses named in the indictment and in the evidence, that some or all of these gambling houses made a profit, that the aggregate of the currency exchange transactions was the amount of the profits, that Johnson received this profit, and that it was all income taxable to Johnson. *This was mere guessing. Not a dollar of this money was traced into Johnson's hands.* If this is not the process of reasoning which the courts condemn, then we do not know what they mean when they say that presumption cannot be piled upon presumption and inference drawn from in-

ference and deduction be made to take the place of proof. *Symonette* v. *United States*, 47 Fed. (2nd) 686.

As was said in *Benn* v. *United States*, 21 Fed. (2nd) 962, at 963:

> "It is highly important, of course, that this and all other criminal laws should be strictly enforced, but it is of far greater importance that a citizen should not be imprisoned and deprived of his liberty under a judgment based on no surer foundation than mere guesswork and speculation. This rule is elementary."

Coming to the expenditure theory for 1939 we find the Government discarding its theory that Johnson had an income in 1936, 1937 and 1938 grossly in excess of the sum reported by him. If Johnson had nearly a million-dollar income in 1938, as the Government contends under its gambling house proprietorship theory, then he had abundant funds to meet the expenditures which the Government claims he made in 1939. In their attempt to conceal their dilemma, Government counsel, as we have shown, entirely ignore the annual periods fixed by the Internal Revenue Act for reporting of income. Taking the year 1939, there is no proof in this record that Johnson spent more money in that year than he had available for expenditure. Johnson reported for 1939 an income of $268,885.98 and the Government claims that he spent in that year $347,469.32. We have demonstrated that the latter figure is incorrect, but, assuming for the sake of argument that it is correct, where is the proof in this record that Johnson did not have at the beginning of 1939 cash available to meet these expenditures? If the Government's contention that Johnson had an income in 1938 of $935,353.80 is true and if its contention that Johnson spent $553,561.32 is conceded, then, according to the Government's own figures, Johnson had an excess of income over

expenditures in 1938 of $380,000, or more than it is claimed he spent in 1939. Even if Government counsel abandon their theory of income from gambling houses, their argument under their expenditure theory must fail for 1939 if they persist in contending that the proof shows under the expenditure theory that Johnson had a greater income in 1938 than he reported. There is no showing of the amount of this alleged unreported income of Johnson for 1938 and so Government counsel have by their contention as to 1938 destroyed all basis for their argument for 1939 on any expenditure theory. Without belaboring the point, we submit that the Government's theories simply will not hang together. The Government did not prove, as to this year or any other involved, that Johnson did not have cash receipts during the period following 1931 which he was not required to report. There was no proof of net worth in any year. There was a total failure of proof on the expenditure theory for 1939, as there was for each of the other years, that Johnson had a taxable income which he failed to report.

A verdict of not guilty should have been directed as to the fourth count of the indictment. There was no competent evidence to support the conclusion that Johnson owed a tax for 1939.

As to Count 5—Conspiracy.

We submit that an examination of this record will show that there is no competent evidence of a conspiracy to defraud the United States of income taxes due from defendant Johnson. All of the direct evidence is to the effect that none of the co-defendants had any knowledge of Johnson's income or of the records kept by him, or of his failure to keep records, or of his income tax reports and that the subject of his income was never discussed by Johnson with any co-defendant. (III. R. 819-820, 862.

879, 939, 960.) There is no direct evidence to the contrary. The case for the prosecution rests entirely on deduction from a mass of disconnected acts, transactions and declarations. It is an effort to supply the place of evidence by piling inference upon inference. *United States* v. *Glasser*, 62 Sup. Ct. 457; *Symonette* v. *United States*, 47 Fed. (2nd) 686.

The language of Judge Hutcheson in *Symonette* v. *United States*, *supra*, so aptly describes the case at bar that we adopt it (p. 687):

> "This is one of those cases, of which the books contain too many instances, of an effort by the government, on a conspiracy indictment, to supply the place of testimony by piling inference upon inference; of an effort to make deduction take the place of proof; and to have the jury, by reasoning backward from non-criminal acts, build up by inference a state of facts to make them criminal, which, if they in fact exist, the evidence ought to have established."

We recognize that a conspiracy may be proved by circumstantial evidence, but it is well established that where the evidence leaves the essential element of an unlawful agreement open to conjecture a verdict for the defendant should be directed. (*United States* v. *Ross*, 92 U. S. 281, 284; *Mackett* v. *United States*, 90 Fed. (2nd) 462, 464; *Dowdy* v. *United States*, 46 Fed. (2nd) 417, 423; *Linde* v. *United States*, 13 Fed. (2nd) 59, 61.) The existence of a conspiracy cannot be established against an alleged co-conspirator by evidence of acts or declarations of other alleged co-conspirators done or made in his absence. (*Thomas* v. *United States*, 57 Fed. (2nd) 1039, 1042; *Minner* v. *United States*, 57 Fed. (2nd) 506, 511; *Hauger* v. *United States*, 173 Fed. 54, 57.) The Government has not pointed out the evidence which it claims establishes the conspiracy

which opens the door for the admission of what would otherwise be hearsay.

This record contains hearsay evidence of conversations and acts and transactions running back into the 20's, over ten years before the year of the first substantive offense charged in the indictment. The whole course of the prosecution was to lift itself over the fence by its own boot straps. (*United States* v. *Glasser*, 62 Sup. Ct. 457, 467.) It used the acts and declarations of the various defendants done or made outside the presence of other defendants to establish the existence of a conspiracy, and at the same time used the theory of a going conspiracy to make proof of the same acts or declarations by alleged conspirators, done or made out of the presence of alleged co-conspirators, competent evidence against all of the defendants. This was clearly error. Before the declarations of alleged co-conspirators can be received in evidence against one charged with participation in a conspiracy, it must be shown by *independent* evidence that the conspiracy existed and that the accused was a party to it at the time the declarations were made. *Logan* v. *United States*, 144 U. S. 263, 308; *Magola* v. *United States*, 71 Fed. (2nd) 65, 67; *Nibbelink* v. *United States*, 66 Fed. (2nd) 178, 179; *Feigenbutz* v. *United States*, 65 Fed. (2nd) 122, 125; *United States* v. *Renda*, 56 Fed. (2nd) 601, 602; *Pope* v. *United States*, 289 Fed. 312, 315; *Stager* v. *United States*, 233 Fed. 510, 513.

There was proof that all of the defendants were professional gamblers and that occasionally they were associated in undertakings in the gambling field. But the mere fact that men are associated in an enterprise, even if it be illegal, is not proof, without more, that a specifically alleged conspiracy exists and that each is a member of that conspiracy. *Wiborg* v. *United States*, 163 U. S. 632, 659;

United States v. *Falcone*, 109 Fed. (2nd) 579, 581; *Dowdy* v. *United States*, 46 Fed. (2nd) 417, 423.

Even if the evidence showed that one or more of the co-defendants knew that Johnson was filing false income tax returns and was attempting to evade the payment of the income tax due from him, which it does not, this would not of itself establish the alleged conspiracy. Mere knowledge of or acquiescence in an illegal act of another, without an agreement to cooperate to accomplish the object of the actor, is not enough to constitute one a party to a conspiracy with him. *Nations* v. *United States*, 52 Fed. (2nd) 97, 105; *Thomas* v. *United States*, 57 Fed. (2nd) 1039, 1042; *United States* v. *Peoni*, 100 Fed. (2nd) 401, 403.

Considering all of the proved facts and circumstances, in the light most favorable to the prosecution, there is still a lack of substantial evidence which excludes every hypothesis but that of guilt. The defendant Johnson did not exercise his privilege of silence and leave the circumstances unexplained. He took the stand and told a straightforward story of his activities as a professional gambler and of his efforts to comply with the income tax law long before others who were engaged in illegal pursuits filed returns and paid taxes. This is not the character of case usually presented to the courts where the accused has followed a course of living indicating a large income, and has filed no return or a return of a small amount, and then, when faced with a prosecution for violation of the income tax law, has hidden behind his privilege of silence and refused to make explanation of his course of conduct. Defendant Johnson has filed returns regularly for twenty years and has paid annually a tax on a very large income. The circumstantial evidence must be weighed in the light of these facts and in the light of Johnson's good reputation for truth, honesty and fair dealing. Viewed in this

light we think it must be held that the evidence for the prosecution is as consistent with innocence as with guilt and that this judgment of conviction under the fifth count cannot be sustained.

On the grounds urged under this division of our brief, the judgment of the Circuit Court of Appeals should be affirmed. There is a failure of proof as to each count of the indictment.

IV.

This defendant was denied a fair trial. Prejudicial error was committed in permitting Agent Clifford to express improper conclusions, in overruling defendant's objections to the admission of evidence, in permitting improper cross-examination of this defendant and his co-defendants, in refusal of defendant's requested instructions, and in sending with the jury on retirement exhibits containing prejudicial matter. The motion for mistrial should have been granted.

If this Honorable Court concludes that the judgment of the Circuit Court of Appeals should be affirmed on any of the grounds argued under the first three divisions of our brief, then it will be unnecessary to consider the errors on the trial. We argue some of the more serious errors here to show this Court that justice will not permit this judgment of conviction to stand, though this Court conclude that this defendant is not entitled to his discharge on this record. Fundamental rights of this defendant were invaded and he was denied a trial in accordance with law and justice.

This Court said at this term in *Glasser* v. *United States*, 62 Sup. Ct. 457, at 463:

> "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but

especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt."

A. Agent Clifford was permitted to weigh the evidence and express his conclusion on the ultimate questions to be decided by the jury. The hypothetical questions asked submitted to this expert the competency of evidence and the credibility of witnesses.

Frank J. Clifford, a Government agent who qualified as an accountant, testified to the conclusions that defendant Johnson had a net taxable income for the years 1936, 1937, 1938 and 1939 in excess of that which he reported. It will appear from an examination of the testimony of this witness (IV. R. 13-18) that he *weighed* all the evidence in the record, that he *determined* the credibility of the witnesses, that he *accepted* the evidence which supported the theory of the prosecution, that he *rejected* the evidence brought out on cross-examination of Government witnesses and the statements of the defendants read into the record by the Government which supported the theory of the defense, and that he *concluded* from this consideration of *all* the evidence that defendant Johnson was guilty, and *expressed this conclusion* to the jury.

Under the most elementary principles established by an unbroken line of authorities it was clearly error to permit this Government agent, with the blessing of the trial judge, to decide this case and announce to the jury that the defendant had failed to report all his taxable income and had evaded payment of income tax as charged in the indictment. *U. S.* v. *Spaulding*, 293 U. S. 498, 506; *Dexter* v. *Hall*, 82

U. S. 9, 26; *United States* v. *Stephens*, 73 Fed. (2nd) 695, 704; *Wilkes* v. *United States*, 80 Fed. (2nd) 285, 291; *United States* v. *Cole*, 82 Fed. (2nd) 655, 657.

Again Government counsel seek to meet this gross invasion of the defendant's constitutional right to a trial by jury by asserting that we object to mere matter of form, and they indulge in a long dissertation, based largely on Professor Wigmore's criticism of this Court's decision in the *Spaulding* case, on the academic question of whether an "expert" witness can usurp the jury's function of deciding the issues of fact. (Their brief, 54-57.) Our objection goes much deeper. If this witness had been asked merely to make a computation of amounts from the facts in evidence, we agree that the mere form of the questions might have been immaterial. Clifford was not asked to state the amount of the financial transactions with respect to each gambling establishment in each year and then the total for all the gambling establishments for each year. *He was asked to state how much income defendant Johnson received in each year.* When the Court permitted Clifford to state this conclusion, and the conclusion stated exceeded by several hundred thousand dollars the amount Johnson had reported in the respective years involved, the Court in effect told the jury that the aggregate of the financial transactions of the operators of the several gambling houses was taxable income of defendant Johnson and left the jury no choice but to return a verdict of guilty.

The enumeration of a lot of exhibits by the prosecutor (IV. R. 13) was mere scenery. The question as to each year was so concluded (IV. R. 15-18) that the "expert" was asked to weigh *all* the evidence in the record and to determine the amount of taxable income of defendant Johnson for each of the years involved. Many of the exhibits identified related only to expenditures, but no questions were directed to Clifford by the prosecutor to bring out the

amount of expenditures by Johnson for the years 1936, 1937, 1938 and 1939 respectively. He was merely asked to lump the total of expenditures for the period 1932 to 1939 inclusive, (IV. R. 14,) without regard to the annual basis of reporting taxable income provided by the Internal Revenue Act. Thus it is clear that Clifford made no reference to the exhibits enumerated when he stated that Johnson's income for 1936 was $547,942.38. As we show, his answer was just guesswork.

It is a new thought that the errors of the trial judge in overruling objections to manifestly improper and prejudicial questions can be cured by cross-examination. (Government brief, 58.) It is true that the cross-examination developed that Clifford's answers were based on assumption piled on assumption, but this did not cure the Court's error in letting Clifford decide the case against defendants in the first instance. Perhaps the cross-examination emphasized the instruction of the Court to the jury, implicit in his overruling of the objections to the questions put to Clifford on direct examination, that Clifford was right in assuming that the aggregate of the financial transactions of the several co-defendants was in fact the taxable income of defendant Johnson. No amount of argument can change the fact that the Court by its action substituted trial by a Government agent for trial by jury.

It was for the jury to decide the amount of Johnson's income in 1936 and the other years involved after consideration of all the evidence, that for the defense as well as for the prosecution. Before the jury could reach the conclusion that the banking and currency exchange transactions should be considered in determining the amount of Johnson's income, it had to decide whether there was evidence justifying the conclusion that Sommers, Creighton, Flanagan, Kelly, Hartigan, Wait and Mackay were mere employees of Johnson and that all of the money handled

by them in these transactions represented taxable income of defendant Johnson. There was no problem here for an accountant. While it may have been proper to have some person, who had a sixth grade education and could add a column of figures, state the total of the financial transactions with which the several co-defendants were identified, an accountant could not be of any service to the jury in determining whether new money was involved in the several transactions so that the total was an amount of proceeds of the business, or whether the same bankroll was turned over weekly in the normal course of operating the business. Nor could an accountant aid the jury in determining whether the several gambling house operators were employees of Johnson, nor whether any net profit resulted from the operation of any of these gambling houses, nor whether Johnson received as income any of the proceeds of the numerous banking and currency exchange transactions. These questions could be determined only by considering all the facts and circumstances in evidence and by weighing the testimony of scores of witnesses, including the credit to be given the testimony of witnesses in the light of facts brought out on cross-examination. A question which submits these matters to an expert witness invades the province of the jury. *United States* v. *Stephens*, 73 Fed. (2nd) 695, 703; *Dexter* v. *Hall*, 82 U. S. 9, 26; *United States* v. *Spaulding*, 293 U. S. 498, 506.

Government counsel say, "The alleged vice in Clifford's testimony is that it attributed to Johnson items of income on which the evidence was conflicting." (Their brief, 56). We have not made and do not make any such contention. We contend that Clifford made assumptions in arriving at his conclusion which are supported by no evidence. Whatever else he did, he did not make a mere computation of figures in evidence to arrive at a total. He went a step further and testified, with the approval of the trial judge, that the total he announced was taxable income

of defendant Johnson. *It is this second step which invades the province of the jury.*

Government counsel say further that "Clifford, in making his computation, has assumed facts constituting the Government's theory of the case." (Their brief, 56). Clifford did more than assume facts; he weighed the evidence, circumstantial as well as direct, and then stated his conclusion as to what the evidence proved. He did not confine his conclusion to the statement of an amount; he said this amount of money was taxable income of this defendant. This was the very question the jury were called upon to decide.

Trial counsel for defendant is complimented by the claim of Government counsel that his cross-examination cured the errors of the trial court in permitting Clifford to answer the questions propounded to him by the prosecuting attorney. In the estimate of Government counsel, it must have been a powerful cross-examination. They ascribe to it a potency which trial counsel never thought it had. If this cross-examination cured the errors assigned, then there is no error which a trial judge can commit on ruling on objections to questions put in direct examination which cannot be cured by cross-examination. The overruling of objections to improper questions forces trial counsel for defendant to make a choice between letting answers to such questions stand unchallenged or attempting to soften the effect of the improper answers by cross-examination.

Clifford did not take into consideration the amount of expenditures of defendant Johnson for the respective years in making his answers as to the total of Johnson's taxable income for said years. His conclusion as to the *amount* of defendant Johnson's *income* for the respective years results from his assumption that Johnson was the owner of all the gambling houses, added to the assumption

that there was net income from these gambling houses, added to the assumption that the aggregate of checks cashed and currency exchanged represented the amount of such income, added to the assumption that this total amount was paid to Johnson, added to the assumption that this represented taxable income of Johnson. This piling of assumption on assumption is squarely within the condemnation of *United States* v. *Ross*, 92 U. S. 281, 283, *Mackett* v. *United States*, 90 Fed. (2nd) 462, 464, *Symonette* v. *United States*, 47 Fed. (2nd) 686, 688, *Dowdy* v. *United States*, 46 Fed. (2nd) 417, 423, *Benn* v. *United States*, 21 Fed. (2nd) 962, 963, and *Linde* v. *United States*, 13 Fed. (2nd) 59, 61. Even a jury is not permitted under the law established by the decisions to make such assumptions, much less a Government agent substituting for the jury.

Just as startling as his statement of conclusions as to Johnson's income from the operation of gambling houses for the several years is Clifford's piling up of expenditures. In answering the question as to the total of Johnson's expenditures, Clifford *weighed* all of the testimony in the record, *accepted* the testimony which suited his purpose, *rejected* the testimony which did not appeal to him, and then *announced* to the jury the result of his mental gyrations. In the course of arriving at his conclusions he decided that William Goldstein told the truth on his direct examination and he brushed aside Goldstein's admissions on cross-examination that he had lied about the ownership of the property at 9730 South Western Avenue and his admission that he might be mistaken about the ownership of The Dells. Clifford also ignored the testimony of architect Nadherny that Skidmore and not Johnson had paid for the erection of the building on Western Avenue and he nonchalantly added the cost of this building to Johnson's expenditures. (III. R. 746.) Without any evidence to support the conclusion, except the inference from the

testimony of Goldstein, who put the title in Johnson's name, and his own recollection that Johnson told him that he owned Bon-Air, Clifford concluded that *all* expenditures made in connection with acquiring and improving the Bon-Air Country Club were made by Johnson. (III. R. 747, 758.) He ignored Nadherny's testimony that Skidmore paid part of the architect's fee and other circumstances developed by cross-examination which showed Skidmore's interest in Bon-Air. (III. R. 750.) Clifford ignored the fact that Goldstein was testifying to save his own skin (II. R. 65) and had shown himself to be wholly unworthy of belief, (compare II. R. 56, 59, with II. R. 64, 66,) and accepted all of his testimony on direct examination at face value and built substantially all his conclusions about Johnson's expenditures upon this slimy shifting foundation.

It seems to us an inescapable conclusion that the error of permitting this Government accountant to invade the province of the jury to the extent shown by the record must reverse the judgment. We submit that the Circuit Court of Appeals was right in holding "that the testimony of this witness, going to the very heart of the controverted issue and invading the province of the jury as it did, was so prejudicial and damaging that it alone would require a reversal of the judgment." (I. R. 200.) On oral argument before the Circuit Court of Appeals, Government counsel admitted that the only question left for the jury after Clifford had testified was whether Clifford had told the truth.

B. The evidence of the financial transactions of the co-defendants was hearsay as to Johnson and highly prejudicial. It furnishes the sole basis for the amount charged.

Most damaging of the evidence received against defendant Johnson was that of numerous banking and currency exchange transactions by co-defendants without any evi-

dence connecting Johnson with such transactions. (Assignments 16(y)-16(cc), III. R. 1046.) The transactions of Sommers at the Northern Trust Company will serve to illustrate the point. It was proved that Sommers came to the bank two or three times a week from 1936 to 1939 and cashed several checks at each visit. These transactions totalled several thousand dollars a year. But there was no proof that a group of checks totalling $3,000 cashed one day did not represent the same money which Sommers received in the cashing of a group of checks a few days earlier. There is as much reason to assume that the cashing of checks every few days represented a turn-over of the same money as there is to assume that the proceeds of the different batches of checks cashed represented new money. None of the proceeds of these checks were deposited. The currency was carried away by Sommers. It was also proved that about eighteen times a year Sommers would bring in a bundle of worn currency averaging about $5,000 and exchange this for new currency, taking about $3,000 in $5 bills and about $2,000 in $20 bills or $100 bills. The undisputed evidence is that this was working money,—bills used for dealing at the craps tables. The tellers were unable to say whether the currency exchanged represented one bankroll exchanged eighteen times, and, therefore, involved only $5,000, or whether it represented new money each time, and so totalled $90,000 a year. None of the currency was deposited.

There was no proof of a total of money accumulated by anyone. It may well be, though the exchanging of currency and the cashing of checks represented an aggregate of $500,000 in transactions in a year, that there was only $10,000 involved, which was turned over once a week or fifty times during that year. There was no proof that defendant Johnson had any connection with any of these transactions or that a dollar of the money ever reached him. There was no proof that the money involved in

the transactions represented income of Sommers, much less that it was income of Johnson. Notwithstanding the absence of proof to establish the *amount* of money involved in these transactions, and the absence of proof that any of the money involved represented profits from any business, and the absence of proof that Johnson had any connection whatever with these transactions, and the absence of proof that Johnson ever received any of the money, the Court received the evidence against Johnson as proof of the amount of income received by him in the aggregate of all the transactions.

It has been held that the mere fact that a *defendant* had transactions involving large sums of money would not prove that all the money handled was taxable income, (*Gleckman* v. *United States*, 80 Fed. (2nd) 394; *Paschen* v. *United States*, 70 Fed. (2nd) 491, 497; *Oliver* v. *United States*, 54 Fed. (2nd) 48, 50,) and we are certain that it has never been held that the proof of transactions of *another* involving large sums of money, even where it is shown that that other is an employee of defendant, is proof that the money belonged to the defendant, or that the total of the transactions was taxable income of the defendant. Such double inferences are too remote to constitute evidence. *Heaton* v. *United States*, 280 Fed. 697, 699; *Nations* v. *United States*, 52 Fed. (2nd) 97, 105.

An aggregate of about a half million dollars of income charged to defendant Johnson was based on the testimony of Agent Lawrason who summarized a lot of checks cashed by co-defendant Creighton at the Mid-City National Bank from his examination through a magnifying projector of Recordak films which he said showed these checks. (Assignments 50-51, III. R. 1060.) There was no foundation laid for Lawrason's assumption that checks were always in the same order when fronts and backs were photographed, nor that the photographing was ac-

curately and competently done. To have cross-examined Lawrason fully with respect to his summarizing of these Creighton checks would have taken at least a week or two, and obviously the defendants would not have dared to so impose on the jury. It is elementary that a witness cannot be permitted to summarize documents which are not produced in court for use of the opponent in cross examination. (*Wilkes* v. *United States*, 80 Fed. (2nd) 285, 291; *Greenbaum* v. *United States*, 80 Fed. (2nd) 113, 120.) To present a document that is not legible is the same as not presenting it at all. The constitutional right of this defendant to be confronted by the witnesses was denied to him by permitting these boxes containing several hundred Recordak films to be received in evidence and permitting Lawrason to summarize them. It was held in *Terry* v. *State*, 21 Ala. App. 100, that a deaf defendant was not confronted by witnesses within the meaning of the Constitution when no interpreter was provided to translate to him what the witnesses were saying from the witness stand. In *People* v. *Clark*, 301 Ill. 428, 433, it was held that the comparing of hand writing outside the presence of the defendant was an invasion of his constitutional right. In principle these cases support our point. In the situation at bar the result would have been exactly the same if Lawrason had come to the stand and testified that he went to the bank and examined a few thousand checks and found among them Creighton's checks totalling so much, without producing any of the checks in court. This hearsay testimony of Lawrason was prejudicial.

Over the objection of this defendant, Bagshaw was permitted to testify that he set up on the books of the Lawrence Avenue Currency Exchange a "Reserve for Uncollected Funds" account and that the transactions in this account amounted to more than a million dollars during the year the exchange operated and that Brown

referred to this account as the "Johnson" account. (II. R. 535-536; Assignments 16(w), 29(i), 38; III. R. 1046, 1051, 1054.) If in referring to this account as the "Johnson" account Brown was referring to defendant Johnson, then the testimony of Bagshaw was clearly hearsay. (*McWhorter* v. *United States*, 281 Fed. 119, 122; *Poole* v. *United States*, 97 Fed. (2nd) 423, 425.) If Brown was not referring to the defendant Johnson, but to some other person or to some corporation, then the testimony was immaterial. Bagshaw testified that he had never seen defendant Johnson prior to the trial and had never had any transactions with him and that his name did not appear on the records of the exchange. (II. R. 542-544.) Brown's testimony before the grand jury to the effect that defendant Johnson had no connection with the exchange and no interest in any of the transactions of the exchange (III. R. 674-675) was read to the jury by the Government, was uncontradicted, and was binding on the Government. Under no theory of the law of evidence was this testimony relating to the years 1938 and 1939 properly received as to the third or fourth counts of this indictment. Even under the fifth count, the statement was not an act in furtherance of the alleged object, (*United States* v. *Nardone*, 106 Fed. (2nd) 41, 43; *Mayola* v. *United States*, 71 Fed. (2nd) 65, 67; *Oras* v. *United States*, 67 Fed. (2nd) 463, 465.) but was a revelation of the scheme to a stranger and tended to defeat the secrecy essential to its success. Notwithstanding there was no proof that any of this money was profit to anyone or that Johnson ever received a dollar of it, this testimony was received as proof that the turn-over of a million dollars represented by the transactions in this account was part of Johnson's income in the years 1938 and 1939.

This evidence of financial transactions of others was rank hearsay as to Johnson. This hearsay evidence is the *sole* basis of the *amount* of Johnson's income as com-

puted by Clifford. We submit its admission against Johnson must reverse the judgment.

C. Prejudicial hearsay evidence was received against Johnson on the question of ownership of the gambling houses.

Now let us look at the evidence which the prosecution claims shows that defendant Johnson was the *sole* owner of the gambling houses operated by the other defendants.

There were dumped into the hopper five Nationwide News Service books, each containing more than one thousand separate customers' accounts. (Assignment 30, III. R. 1051-1052.) Not a single one of these accounts was identified with defendant Johnson and yet several of them contained prejudicial entries which might or might not have referred to defendant Johnson, and which the jury was left to guess did refer to him. There was no attempt to prove that these entries were made by co-conspirators, much less that they were made in furtherance of the alleged common object. There was in the 1934 book (Gov. Ex. 0-11) an account headed "W. Johnson, 162 North State St., Room 611", but there is no proof in the record indicating that this defendant was ever located at that address, or that this account refers to this defendant. In the 1935 book (Gov. Ex. 0-12) there is an account headed "Lincoln Tavern, Dempster St. near Lincoln", and across the corner of this ledger sheet is written in ink, "To Bill Johnson's book". No witness testified who wrote this casual memorandum on this ledger sheet, or when it was written, or what it meant. No one identified the account as having any relation to this defendant or any business with which he was connected. The jury was left to speculate when this entry was made, who made it, what was meant by it, and whether it referred to this defendant. In the same book was another sheet headed, "Mead, 6825 Milwaukee Ave." and the

same notation was written across the corner of this sheet. In the 1936 and 1937 books (Gov. Ex. 0-13 and 0-14) was an account headed, "Flanagan (Bill Johnson) 2141 So. Crawford Ave." There was proof in the record that co-defendant Flanagan operated a gambling house at 2141 South Crawford (now Pulaski), but there was no proof that the parenthetical statement on this account referred to defendant Johnson, nor was there any proof that defendant Johnson had any connection with this address except that he owned the building and leased it to Flanagan. If speculation is to be indulged in, then we may guess that the "Bill Johnson" was put after "Flanagan" to identify the customer as the Flanagan who leased Johnson's building. There might be many guesses made as to the meaning and purpose of the parenthesis. In the 1937 book was also an account headed "Bon-Air Country Club, Sikokis No. 2". The jury was left to speculate whether Johnson was interested in this account notwithstanding the proof showed that he did not become connected with Bon-Air Country Club until 1938. In the 1938 book was an account headed, "Red Creighton, 6245 Cottage Grove 2nd", and across this account was written with a red pencil the name "Johnson". Who wrote this casual memorandum, when it was written, and whether it referred to this defendant was not proved. In the 1939 book (Gov. Ex. 0-15) was an account headed, "W. Johnson, 1651 E. 53rd St., first", but again the jury was left to speculate whether that account belonged to defendant Johnson. In the same book was an account headed, "W. Kelly, 1023 E. 43rd St.", and attached to it was a tab on which was written "ck sined Wm.J.", and the jury was left to speculate whether the account belonged to co-defendant Kelly and whether the notation on the tab meant that a check for service charges covering this account was signed "Wm. J. Kelly", or whether it was signed "Wm. Johnson", or whether it was in any other

way identified with any of the defendants. No doubt the jury knew that these books were Annenberg racing service books, but the jury was left to speculate what, if anything, the books proved in this case. The fact that these voluminous account books were offered and received in evidence justified the jury in believing that the Court believed that the accounts recorded had some connection with the case against this defendant but the jury was left to guess which accounts, if any, were identified with him and what the casual memoranda on some of the accounts meant. Under well established rules of evidence these accounts were improperly received. *United States* v. *Dressler*, 112 Fed. (2nd) 972, 975-981; *Morris* v. *Davis*, (Tex. Civ. Ap.), 3 S. W. (2nd) 109; *Harrison* v. *United States*, 200 Fed. 662, 673-674; *Nicola* v. *United States*, 72 Fed. (2nd) 780, 783; *Singer* v. *United States*, 58 Fed. (2nd) 74, 76.

A great quantity of Illinois Bell Telephone Company records relating to telephone service furnished by Flanagan to the customers of his service bureau and to telephone services of other co-defendants in their respective gambling houses was received in evidence against defendant Johnson, together with elaborate explanations of what they recorded. (II. R. 195-205, 208-215, III R. 697-704.) In no instance was there any proof that Johnson had any connection with these services. There was also received in evidence a map of Chicago and vicinity (Gov. Ex. 0-1) on which were placed thumb tacks showing the location of various gambling houses and this map was used in connection with the explanation of the telephone services rendered to the establishments indicated. (II. R. 11, 197.) There was no direct evidence that defendant Johnson had any connection with these various establishments, but there was an assumption throughout the trial that the chart pictured a chain of gambling houses operated by this defendant. The O'Neil testimony and records relative to the

delivery of bookmakers' supplies to some Morgan on Milwaukee Avenue (III. R. 729-732) were the basis of some of the conjecture in which the prosecutors indulged in picturing a chain of gambling houses operated as a unit.

The Court received these records on the theory that the statute (Sec. 695, Title 28, U.S.C.) removed the requirements to identify a record with a defendant and to otherwise establish its trustworthiness as evidence. (II. R. 167, 168, III. R. 1004.) This is directly contrary to well reasoned decisions respecting State statutes identical, in substance, with the Federal statute. (*Johnson* v. *Lutz*, 253 N.Y. 124, 170 N.E. 517, 518; *Kelly* v. *Ford Motor Co.*, 280 Mich. 378, 273 N.W. 737, 741; *Kelly* v. *Crawford*, 112 Wis. 368, 88 N.W. 296, 297.) The admission of all these accounts and the deductions therefrom against Johnson was error which should reverse the judgment, if the record were otherwise free from error. A fair trial was impossible when such hearsay was received in documentary form.

There were also received in evidence testimony and exhibits relating to storage of furniture and gambling paraphernalia belonging to certain named co-defendants, to transfer of furniture and gambling paraphernalia from one location to another, and to bus services from and to certain gambling houses. (II. R. 265-266, 270-271, 272, 306-308.) Mechanics who performed construction and repair work for various gambling establishments were permitted to testify in great detail concerning the services performed and the work done. (II. R. 128-131, 135, 235-240, 336-337.) None of these witnesses had any dealings with Johnson and there was no proof that Johnson paid for the services or received the benefit of them. The jury was left to speculate about the connection of Johnson with all of this work. Apparently it was assumed by the prosecution that because the same workmen performed services at several different establishments operated by co-defendants there must be

a common owner and that this owner was defendant Johnson. This was mere conjecture and was unsupported by proof.

What the Court said in *Sorenson* v. *United States*, 168 Fed. 785, is particularly applicable to this great mass of detail which threw no light on the question of whether Johnson failed to return all his income and which served only to confuse: (pp. 799-800)

> "A proper analysis of the pronouncements of courts favoring the admissibility of isolated instances of an inculpatory character, and the advisability of not excluding each disjected part merely because of its insufficiency to justify a conviction, will disclose that the parts held to be admissible come within the range of legal competency, according to established rules of evidence as applied to the special facts and circumstances of the particular case. But they do not imply that mere suspicion is the equivalent of proof, or that mere hearsay testimony may be resorted to, or that unrelated, incompetent incidents and circumstances may become admissible because of the number of them. In law as in mathematics the multiplication of 0 by 2 does not make 1. In other words, a piece of evidence, which in and of itself is incompetent under settled rules of law, cannot be rendered admissible by attempting to link it up with some other fact or circumstance that might be competent. Otherwise, it is made possible to augment 1 by the mathematical absurdity of attempting to add to it 0."

D. Johnson was prejudiced by a mass of evidence relating to acts of other defendants wholly unconnected with him.

Individual income tax returns of various co-defendants were received in evidence against defendant Johnson. (Gov. Ex. R-14 to R-19, R-24 to R-28, R-35 to R-42, R-44 to R-49,

R-52 to R-57, R-58 to R-64, R-81 to R-85, R-108; Assignments 17-18, III. R. 1047-1048.) Government agents were permitted to testify to statements made by the various co-defendants about their individual returns, (III. R. 706, 767-772) and to relate their difficulties in locating some of the co-defendants. (III. R. 739, 777-781.) The receipt of this evidence was highly prejudicial to defendant Johnson. Great emphasis was placed on these returns and conversations relating to them. Apparently this mass of evidence was received against Johnson on the theory that the individual operators of the gambling houses could not have conducted their establishments, which involved large financial transactions, without making more profit than was indicated by their individual returns, and that therefore some person of larger income must have been receiving profits from the various establishments operated by co-defendants, and that Johnson had over a long period of time made returns showing large profits from gambling and that therefore he must be the owner of these gambling establishments, and must be making more profits than he was reporting. Especially damaging to Johnson were the entries on these blanks and the testimony of the accountants indicating that the taxpayers were employees of someone and that their incomes were salaries or commissions paid and not profits from a business of their own. All of the deductions drawn from these returns were highly speculative and the result of pure conjecture. It was substitution of deduction for proof with a vengeance. The Court erred in receiving the exhibits in evidence and the testimony with respect thereto and erred in refusing the instructions directing the jury not to consider them as against defendant Johnson. (Assignments 19-22, III. R. 1048-1049.) Under the Court's rulings Johnson was put on trial for the omissions and commissions of all the co-defendants with respect to their own returns from 1932 to the time of the trial. These returns and the acts and declarations of the several

taxpayers in connection with the making, filing and auditing of the returns were hearsay as to defendant Johnson. *Greenbaum* v. *United States*, 80 Fed. (2nd) 113, 125; *Fox* v. *United States*, 45 Fed. (2nd) 364, 365; *Brown* v. *United States*, 298 Fed. 428, 430.

Co-defendants, on cross-examination, testified to the destruction of records and files in their respective gambling houses (III. R. 826, 873, 886, 939-940; Assignment 24, III. R. 1049) and there were also received in evidence the grand jury testimony of co-defendant Brown and the testimony of Clifford with respect to the destruction of the records of the Lawrence Avenue Currency Exchange. (III. R. 628, 641, 739.) No proof was received that Johnson had any knowledge of these records or their destruction. The evidence was rank hearsay and was highly prejudicial to this defendant. It is difficult to conceive of evidence more likely to inflame the minds of the jury against a defendant in a case of this character. *Bryan* v. *United States*, 17 Fed. (2nd) 741, 742.

Especially damaging to defendant Johnson was the grand jury testimony of Brown, (Gov. Ex. 0-211,) read to the jury (III. R. 614-692) and sent to the jury room. (III. R. 1023.) Throughout the inquisition are the insinuations or statements of the three prosecutors, Campbell, Plunkett and Miller who were present, that Johnson was in some conspiracy with Brown and other co-defendants. For instance, there were the assumption that Johnson operated a gambling house at 4020 Ogden at some time prior to 1932, (III. R. 619,) the statement of prosecutor Plunkett that Hartigan was a lieutenant of Johnson, (III. R. 686,) and the reference to checks cashed at Brown's exchange as "gamblers' rustled checks," (III. R. 643,) as "checks of suckers who had lost in the gambling houses," (III. R. 647,) and as "checks from outlaw business." (III. R. 652.) Repeatedly, prosecutor Campbell threatened to cite the

witness for contempt. (III. R. 639, 647.) The witness was before the grand jury at six sessions and was so badgered by the three prosecutors that the Court permitted only a portion of the testimony to be read. (III. R. 563-564, 613-614). The prejudicial effect of this hearsay testimony was not cured by the attempt to limit it to Brown. *Whealton* v. *United States*, 113 Fed. (2nd) 710, 715; *Holt* v. *United States*, 94 Fed. (2nd) 90, 94.

Government agents were permitted to testify that they made an effort to locate certain witnesses and were unable to contact them, (III. R. 739, 777-780,) and many other witnesses were interrogated about their knowledge of the whereabouts of persons who were not produced by the Government. There was no showing that Johnson had any knowledge of the whereabouts of any of these persons or that he had contacted them or that he had done anything to cause them to conceal themselves. Obviously, this testimony carried the implication that Johnson was responsible for the inability of the Government to locate witnesses and that he was concealing witnesses because their testimony would be damaging to him. This testimony was immaterial and was prejudicial. Such evidence has been repeatedly condemned by the courts. *McWhorter* v. *United States*, 281 Fed. 119, 120; *People* v. *Sharp*, 107 N. Y. 427, 14 N. E. 319, 342; *Sunderland* v. *United States*, 19 Fed. (2nd) 202, 208; *People* v. *Stanley*, 47 Cal. 113, 118; *United States* v. *Buete*, Fed. Case, No. 14680(a).

Scores of witnesses recited the details of the operations of gambling houses by the several co-defendants and related conversations and transactions that took place outside the presence of defendant Johnson. By the receipt of this testimony the case degenerated into one resembling the prosecution of a conspiracy to operate gambling houses and undue emphasis was placed upon the illegal occupation in which defendants were engaged. Certain gamblers

were permitted to relate in detail their experiences at various gambling houses. (Assignment 31, III. R. 1052-1053.) Witness Blake told of his large losses at houses operated by co-defendant Creighton and produced checks to support his testimony. Witness Kauders related his gambling experiences at the houses of Sommers and Kelly. Witness Wendt testified to gambling at houses operated by Sommers and told of paying Sommers a $700 debt, leaving the jury to assume that this was a gambling debt. Witness Rehman told of her career as a gambler and related conversations which she had with gambling house operators outside the presence of defendant Johnson and particularly some with Sommers directly connecting Johnson with the operation of the Horse-Shoe Club. Witness Bissell told of his gambling losses and of transactions involving borrowing of money from co-defendant Sommers and related a telephone conversation between Sommers and another person, who, Bissell said Sommers told him, was defendant Johnson. Witness Van Spankeren told of a suit which his mother-in-law brought against a number of persons including defendant Johnson and co-defendant Sommers and of the negotiations which resulted in the settlement of the suit by Sommers. All of this, which was hearsay as to defendant Johnson, brought into the case the damaging effect of losses at the gambling tables and was immaterial to any issue in the case. Assuming that the conspiracy charged was proved, these acts and declarations were not in furtherance of the alleged object. It is difficult to conceive testimony more prejudicial to a defendant in a case of this character. That its receipt was reversible error seems to us inescapable. *Boyd* v. *United States*, 142 U. S. 450, 458; *People* v. *Paisley*, 288 Ill. 310, 324; *Rosencrance* v. *State*, 33 Wyo. 360.

The receipt of the evidence giving details of the controversy between the Glaves and Jackson respecting the

ownership of Harlem Stables, which carried the implication that the defendant Johnson and some of his co-defendants "muscled" the Glaves out of their place of business and "robbed" them of fixtures and stock worth $3500 and then bought them off by paying to them and to former employees $600 to procure the withdrawal of the complaint filed with the State's Attorney, involved proof which indicated complicity in the commission of other crimes and left the suspicion that Johnson may have bribed the State's Attorney through Glaves' lawyer, who was said to be the State's Attorney's cousin. (Assignment 34, III. R. 1054.) How much the Glaves had invested in this place of business and what were the merits of their controversy with Jackson were altogether immaterial. (*Coulston* v. *United States*, 51 Fed. (2nd) 178, 180; *Weil* v. *United States*, 2 Fed. (2nd) 145, 146.) If any part of this evidence was competent it was only that part which tended to prove Johnson's ownership of Harlem Stables. A half dozen questions and answers would have produced all of this competent evidence. The jury was distracted by the horrid details of the gangster methods described by the Glaves and it was impossible to cure the damage done if the Court had been inclined to alleviate the error by instructing the jury on the subject. Instead, the Court gave his approval to the tactics of the Glaves by overruling objections to their testimony, (II. R. 284-285, 290,) and by refusing to instruct the jury to disregard the incompetent evidence. The courts have repeatedly condemned receipt of evidence which tends to degrade a defendant and to show his complicity in other crimes. (*Boyd* v. *United States*, 142 U. S. 450; *Fish* v. *United States*, 215 Fed. 544, 549; *Crimmian* v. *United States*, 1 Fed. (2nd) 643, 645; *Smith* v. *United States*, 10 Fed. (2nd) 787, 788; *Macdonald* v. *United States*, 264 Fed. 733, 738.) Convictions are reversed where the evidence received is immaterial and prejudicial. After this evidence

was received, the defendant was put to the proof that he was not guilty of robbing the Glaves. The fact that it was established that the Glaves were perjurers (III. R. 804-806, 813, 953) did not remove the damage done by injecting into the case this collateral matter. It is not possible to measure the damaging effect of this immaterial evidence and the presumption is that it influenced the jury against this defendant.

E. The admission of improper evidence prejudiced the rights of this defendant and constituted reversible error in this case.

It cannot be said that the admission of the improper evidence in this case was not prejudicial. An erroneous ruling which relates to the substantial rights of an accused is ground for reversal, unless it affirmatively appears from the whole record that it was not prejudicial. It has been held that a conviction in a criminal case should not be affirmed unless it is made to appear beyond a doubt that the improper evidence admitted did not prejudice the rights of the accused. (*McCandless* v. *United States*, 298 U. S. 342, 347; *Sprinkle* v. *United States*, 150 Fed. 56, 59; *Holt* v. *United States*, 94 Fed. (2nd) 90, 94; *Little* v. *United States*, 73 Fed. (2nd) 861, 866.) Where improper prejudicial evidence is offered and received, the prosecution will not be permitted to say that it did not influence the jury. Even bad men are entitled to a trial on competent evidence and according to law. *Boyd* v. *United States*, 142 U. S. 450, 458; *United States* v. *Dressler*, 112 Fed. (2nd) 972, 977; *Whealton* v. *United States*, 113 Fed. (2nd) 710, 715; *Singer* v. *United States*, 58 Fed. (2nd) 74, 77; *Collenger* v. *United States*, 50 Fed. (2nd) 345, 349.

Specific instructions limiting the use of this hearsay testimony were refused. (Requests 39, 56, 57, 59-72, 73 and 75; III. R. 1028, 1031-1032.) This defendant did not

have a fair trial. Justice demands that a new trial be granted for the errors in the admission of evidence, even if it should be held that the judgment is not reversible on other grounds assigned.

F. The defendants were subjected to improper cross-examination by the prosecuting attorneys and by the Court and this defendant was prejudiced thereby.

During the course of the cross-examination of defendant Johnson by the prosecuting attorney it was repeatedly implied that he bribed public officials for protection of himself and others engaged in operating gambling houses. (III. R. 967, 976.) This improper cross-examination was emphasized by remarks of the prosecuting attorneys that carried the suggestion that Johnson, being engaged in illegal business, could not operate without corrupting public officials. (Ill. R. 914, 976.) The curt overruling of defendants' objections added to the injury. (III. R. 914, 967.) During the cross-examination of defendant Johnson and co-defendant Wait, by questions directed and remarks made, the prosecutor charged that William Skidmore was the political fixer for Johnson and other gamblers. (III. R. 913-914, 966, 968.) Johnson was also cross-examined at length about ownership of an interest in a company which furnished gambling paraphernalia to some co-defendants. (III. R. 980-981.) Wait was cross-examined with respect to Johnson's connection with dog tracks in 1927 and was asked in detail concerning arrangements made between the Lawndale Kennel Club owned by Johnson and Wait and the Hawthorne dog track. (III. R. 903-904.) During the cross-examination of Johnson he was asked about his connection with gambling houses prior to 1930. (III. R. 987.) He denied that he owned gambling houses in 1929 and there was then propounded to him a series of questions purportedly based upon a statement which Johnson

had made to some Government agents in 1932 relative to his activities in 1929. (III. R. 957-988.) This cross-examination was outside the scope of his direct examination, was on immaterial matter and was highly prejudicial. It tended to degrade defendant Johnson and involve him in other crimes not related to those charged. How it tended to prove that Johnson wilfully attempted to evade the payment of income tax for 1936 and thereafter or that he conspired to defraud the United States of income tax for those years is difficult to conceive. That the questions were asked and the remarks were made to inflame the jury is too obvious to require argument. They could have served no purpose but to create an atmosphere of hostility and to divert the attention of the jury to immaterial matters.

The Court, by cross-examination of witness Pfingsten and witness Hare, indicated that he did not believe their testimony. He implied that Pfingsten, who has been engaged in property management in Chicago for many years, was concealing from his principals that he was dealing with gamblers when he leased space to Creighton at 63rd and Cottage Grove Avenue. (III. R. 853). How this had any bearing on the issues being tried does not appear. The Court implied by his questions that Hare was withholding information respecting preliminary steps in connection with the purchase of the Bon-Air Country Club. (III. R. 915.) There was nothing in the direct examination which warranted this attitude of the Court. In no instance did the Court cross-examine a Government witness except to aid the Government in developing evidence against the defendants. (II. R. 30, 32, 120, 151, 155, 158, 169, 488, III. R. 573.) That was also the effect of his cross-examination of Sommers on the percentage against a player on a roulette wheel. (III. R. 845-847.) Even the perjurer Goldstein who testified that he held a license to practice law did not excite the Court's displeasure by his

evasive answers on cross-examination. Further proof of his perfidy was barred by the Court's declining to postpone his cross-examination until defendant's counsel could make the necessary investigation for further testing the truth of his statements. II. R. 62, 67, 68.

In these respects the Court threw the weight of his position against the defendants, contrary to the rule often announced that the Court must not only be impartial but must appear so. (*Adler* v. *United States*, 182 Fed. 464, 472; *Williams* v. *United States*, 93 Fed. (2nd) 685, 687; *Hunter* v. *United States*, 62 Fed. (2nd) 217, 220; *Frantz* v. *United States*, 62 Fed. (2nd) 737, 739.) The Court seemed to have some notion that the rule governing cross-examination of defendants was different from that governing the cross-examination of other witnesses (III. R. 876), notwithstanding the well established rule to the contrary. The Court is under the same obligation to keep the cross-examination of a defendant within proper bounds as in the case of any other witness. *Smith* v. *United States*, 10 Fed. (2nd) 787, 788; *Taylor* v. *United States*, 19 Fed. (2nd) 813, 817; *Gideon* v. *United States*, 52 Fed. (2nd) 427, 430; *Coulston* v. *United States*, 51 Fed. (2nd) 178, 181; *Tucker* v. *United States*, 5 Fed. (2nd) 818, 822; *Harold* v. *Territory*, 169 Fed 47, 53.

Closely akin to improper cross-examination is the stump speech of prosecutor Campbell at the close of the examination of Johnson by the prosecutors and agents March 27, 1939, the report of which appears at the end of Government's Exhibit O-207, read to the trial jury: (II. R. 418)

> "Now, our information again is that you are an interested party in a number of gambling houses around here, and I'm inclined to think that our information will be found to be accurate, so that being the case, your story here this afternoon is not in accordance with our information. Now, I want you to

think that over seriously between now and the next time you come down. You'll have a return engagement here, and at that time I think I shall confront you with places. And there's also a penalty for perjury here on these questions and answers. I'm going to caution you about that. The next time you come down here, if you want to stand on your statement given today, it's all right. I'm not threatening you. I want to square up the situation one way or the other, that you do or do not own these places. And that isn't newspaper stuff, either."

Obviously improper matter brought to the attention of the jury by remarks of the prosecuting attorney, or by the questions of the cross-examiner, is no less prejudicial than evidence erroneously admitted over objection. (*Toubin* v. *United States*, 93 Fed. (2nd) 861, 868; *Skuy* v. *United States*, 261 Fed. 316, 319; *Berger* v. *United States*, 295 U. S. 78, 84; *Bombarger* v. *United States*, 219 Fed. 841, 843.) When the prosecutor cross-examines to degrade the defendant and prejudice him with the jury, he cannot be heard to say that the cross-examination did not do what he intended it should do. (*Salerno* v. *United States*, 61 Fed. (2nd) 419, 424; *Coulston* v. *United States*, 51 Fed. (2nd) 178, 182; *Miller* v. *Territory*, 149 Fed. 330, 339.) The prosecuting attorney could have had no other object in cross-examining defendant Johnson and his co-defendants on immaterial matters than to prejudice them with the jury. That he accomplished his purpose is too plain for argument. A recent case, *United States* v. *Nettl*, 121 Fed. (2nd) 927, holds that a conviction must be reversed where there is cross-examination of the character disclosed by this record.

G. This defendant was prejudiced by improper rebuttal offered to impeach on immaterial matters injected into the case on cross-examination of defendants.

It is well settled that it is not proper to impeach a witness by proof of prior contradictory statements on a subject collateral to the issue. (*Newman* v. *United States*, 289 Fed. 712, 716; *Despiau* v. *United States Casualty Co.*, 89 Fed. (2nd) 43, 46; *Bullard* v. *United States*, 245 Fed. 837, 840; *Harrold* v. *Territory*, 169 Fed. 47, 51; *People* v. *Pfanschmidt*, 262 Ill. 411, 462.) Accordingly the Government was bound by the answers of defendant Wait with respect to the time and place of the faro game with Laemmle, (*Rau* v. *United States* 260 Fed. 131, 136; *Smith* v. *United States*, 10 Fed. (2nd) 78 , 788; *Coulston* v. *United States*, 51 Fed. (2nd) 178, 180, .82,) and this defendant was prejudiced by the testimony of Ross in rebuttal of Wait's answers. (III. R. 998-1001.) Likewise the Government was bound by Johnson's answers with respect to whether he operated gambling houses in 1929 and prior thereto, (*Smith* v. *United States*, 10 Fed. (2nd) 787, 788; *Weil* v. *United States*, 2 Fed. (2nd) 145; *Rau* v. *United States*, 260 Fed. 131, 136; *Bullard* v. *United States*, 245 Fed. 837, 840,) and the admission of Johnson's statement to the Government agents in 1932 to the contrary was prejudicial. (III. R. 996-998.) This rebuttal testimony brought in immaterial matter and distracted the attention of the jury from the issues of the case. Occurring at the end of the trial, as it did, it left the jury with a fresh impression that defendant Johnson had testified falsely with respect to his activities prior to 1929 and it impaired, if it did not destroy, the effect of his testimony on matters that were material to the issues. That the admission of this rebuttal testimony was reversible error seems to us an unavoidable conclusion.

In cross-examining Johnson, the prosecuting attorney held in his hands a transcript of the alleged statement of Johnson, and later held the transcript in his hands in putting the rebuttal questions to witness Huebsch. (III. R. 989, 996.) Defendant's attorney requested permission to examine this statement for the purpose of re-direct examination of defendant Johnson and for the purpose of cross-examination of witness Huebsch and this was refused. (III. R. 989-990, 996.) This action of the Court was error. *Wright* v. *Bragg*, 96 Fed. 729, 733; *State* v. *Worley*, 82 W. Va. 350, 96 S. E. 56, 57; *State* v. *Murphy*, 154 La. 190, 97 So. 397, 402; *Butcher* v. *Seattle*, 142 Wash. 588, 253 Pac. 1082; *Polk* v. *M.K.T.R. Co.*, 341 Mo. 1213, 111 S. W. (2nd) 138, 146.

H. The motion for mistrial should have been granted. There was no other way open to assure the defendants a fair trial after the misconduct of the prosecutors and the erroneous rulings of the Court created an atmosphere of general criminality.

The Court erred in denying the motion to withdraw a juror and to declare a mistrial for prejudicial conduct of the prosecuting attorneys and of the Court on cross-examination of defendants and their witnesses. III. R. 1003.

This prejudicial conduct in bringing to the attention of the jury toward the end of the trial the implications that Johnson was a gangster, that he was buying police protection, that he was secreting witnesses, and that he was generally untrustworthy was so prejudicial that a fair trial could not be had. Johnson was charged in this case with the crime of unlawfully attempting to evade the payment of income tax and with conspiring with others to defraud the United States of income tax due from him and with nothing else. The issues were narrow. To inject into the case matters entirely foreign to these charges

distracted the attention of the jury from the questions they were called upon to decide and left a prejudice with the jury that could not have been corrected by instructions by the Court, if any had been given on the subject. There was no course that would have safeguarded the rights of the defendant other than the declaration of a mistrial. *Holt* v. *United States*, 94 Fed. (2nd) 90, 94.

I. Exhibits not identified with defendant Johnson and containing immaterial matter should not have been sent with the jury on retirement. The sending of the truckload of exhibits to the jury room was an invasion of the privacy of the jury and a denial of defendant's constitutional right to be confronted with the witnesses against him.

Sending to the jury a mass of documents lays undue emphasis on a part of the evidence, and the Court should permit the jury to have only such exhibits as he finds necessary to a proper consideration of the case. (*Buckley* v. *United States*, 33 Fed. (2nd) 713, 717; *People* v. *Clark*, 301 Ill. 428, 432.) It is error to permit exhibits to go to the jury which contain prejudicial matter, even though parts of the exhibits are material and properly in evidence. (*United States* v. *Dressler*, 112 Fed. (2nd) 972, 978.) The presumption is that the presence in the jury room of improper exhibits is injurious to the defendant. *Ogden* v. *United States*, 112 Fed. 523, 527.

It is impossible to tell what damaging effect upon the minds of the jury resulted from the truckload of exhibits that was hauled into the jury room. Every document which was received in evidence was delivered to the jury over the objection of defendants. (III. R. 1023-1024.) This included the fifty-two individual income tax returns of the several defendants, the statements of Johnson, Sommers, Kelly and Hartigan, the grand jury testimony of Brown, the voluminous records of the Nationwide News Service,

the mass of records of the Illinois Bell Telephone Company, and miscellaneous ledger sheets, deposit slips, Recordak films, delivery tickets and what not. (Assignment 39, III. R. 1055-1057.) Out of the presence of the defendants and without the supervision of the Court, the jury were permitted to select such of these exhibits as they chose and draw such conclusions from them as they pleased. The jury had much of the Government's evidence before them in writing but were left to recollect the defendants' explanations of these various exhibits and their testimony with respect to them. It was reversible error to thus invade the jury room.

These grave errors compel a reversal of the judgment of the District Court.

CONCLUSION.

We confidently believe that the indictment is void, not only because the grand jury that returned the indictment had no legal existence but also because of the insufficiency of the indictment itself. We also sincerely present our claim that there is no competent evidence in the record which will support the conviction under any count of this indictment. If any of these positions is sustained, then the judgment of the Circuit Court of Appeals will be affirmed and the defendant discharged.

If this Court should conclude that there is a valid indictment and that there is some substantial evidence in the record on which the jury might reasonably have based its verdict as to some count, then we earnestly submit that the many errors committed in the admission of incompetent and immaterial evidence and in the improper cross-examination of the defendants and their witnesses denied to this defendant that fair and impartial trial which is the boast of the American system of criminal justice.

In the atmosphere created at the trial it was impossible for the jury to fairly weigh the evidence and reach a true verdict. The harsh judgment entered against this defendant cannot be sustained in the light of the well established rules governing the trial of criminal cases.

We pray that the judgment of the Circuit Court of Appeals be affirmed. If this Honorable Court does not affirm, then we humbly pray that a new trial be granted so that this defendant's case may be presented to another jury and his guilt or innocence determined according to the law of the land.

Respectfully submitted,

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